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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~531~~. 250

WILLIAM S. MELLEN, TRUSTEE FOR THE USE OF SOPHIA H. BOYD, AND SOPHIA H. BOYD, APPELLANTS,

vs.

THE MOLINE MALLEABLE IRON WORKS, CHARLES F. HEMENWAY, STILLMAN W. WHEELOCK, STEPHEN T. WALKER, AMAZIAH L. CARSON, AND JEREMIAH S. KEATOR AND BEN. C. KEATOR, LATE PARTNERS AS J. S. KEATOR & SON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED APRIL 12, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 531.

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vs.

THE MOLINE MALLEABLE IRON WORKS, CHARLES F. HEMENWAY, STILLMAN W. WHEELOCK, STEPHEN T. WALKER, AMAZIAH L. CARSON, AND JEREMIAH S. KEATOR AND BEN. C. KEATOR, LATE PARTNERS AS J. S. KEATOR & SON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 10, 1887.

Ohio, bring this their bill of complaint against The Moline Malleable Iron Works, a corporation existing under and by virtue of the laws of Illinois, doing business at the town of Moline, in said State of Illinois, and a citizen of said State of Illinois and of the northern district thereof; Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson, Jeremiah S. Keator, and Ben. C. Keator, late partners under the firm name of J. S. Keator and Son, each and all of said parties being residents of said town of Moline and citizens of the State of Illinois and residents of the northern district thereof.

Your orators further show unto this court that on the 23d day of June, 1883, the said Moline Malleable Iron Works duly exe-
4 cuted and delivered its deed of *deed of* trust, whereby it conveyed unto the said Charles F. Hemenway in trust, as hereinafter set forth, the following-described, lots, pieces of parcels of land situate in the city of Moline, county of Rock Island, and State of Illinois, and described as follows: Block number nine (9), in Pitts, Gilbert & Pitts' second addition to Moline, consisting of fourteen (14) lots, numbered from one (1) to fourteen (14), inclusive; to have and to hold the same, with all the privileges thereunto — or in anywise appertaining, in trust, as follows:

"Whereas the said grantor has procured S. W. Wheelock and A. L. Carson, both of said city of Moline, to guarantee its paper by endorsing the same to the extent of forty-nine thousand ($49,000) dollars, more or less, in order that said corporation might be able to negotiate the same and thereby procure the money necessary to enable it to carry on its business;

"And whereas the said The Moline Malleable Iron Works has also induced George H. Hill, of the city of Cincinnati, in the State of Ohio, to also guarantee other of its paper by endorsing the same to the extent of twenty thousand ($20,000.00.) dollars;

"And whereas the said Moline Malleable Iron Works has
5 also induced the J. S. Keator Lumber Company to guarantee one thousand ($1,000.00) dollars of its commercial paper for the purpose aforesaid;

"And whereas of the paper endorsed by the said Wheelock and Carson forty-eight thousand five hundred ($48,500.00) dollars is still outstanding and unpaid, and said Wheelock and Carson are still liable thereon;

"And whereas said Wheelock and Carson were induced to endorse said papers by the promise on the part of said The Moline Malleable Iron Works to secure the same by granting a lien on above-described premises;

"And whereas said The Moline Malleable Iron Works, in consideration of the signing and endorsing of the said paper by the said Wheelock and Carson and by said Keator Lumber Company and said Hill, has agreed and contracted with each and every of said parties to take up, meet, and pay said paper and each and every part thereof as fast as the same falls due, so that neither said Wheelock and Carson nor said Keator Lumber Company nor said Hill shall be subjected to any liability, loss, cost, damage, or expense by reason of

they or either of them having endorsed, guaranteed, or signed such paper or any part of it heretofore;

6 "Now, whenever said Wheelock, said Carson, said Keator Lumber Company, and said Hill shall cease to be liable in any way on the paper of said grantor, and the same shall have been fully paid and satisfied and each and all of said endorsers fully discharged from all liability on said paper, and when each and all of said endorsers shall have been fully paid and reimbursed for all costs and expenses and damages, including reasonable attorney's fees, which he may have suffered or to which he may have been subjected in any way by reason of his having guaranteed, endorsed, or signed said paper or any part of it, and fully discharged from all liability on account of all said paper so endorsed, guaranteed, signed by them or either of them, then said grantee or his legal representatives shall recover all the estate hereby acquired in said premises, to and at the expense of said grantor, its successors and assigns: Provided, however, and it is distinctly understood, That in case of any of said paper being renewed by any one of the endorsers thereto, in order to save the same from being dishonored, the provisions of this deed shall be held to apply to said paper so renewed in the same manner that it applies to such paper now in existence;

7 "Now, in case said grantors shall make any default in its agreements hereinbefore set forth or any of them it shall be the duty of the grantee herein, upon the request of either said Wheelock, Carson, Keator Lumber Company, or Hill, provided the liability of the person so requesting is existing at the time of making such request or some liability on his part or upon the written request of the legal representatives of either of said persons, to foreclose this deed and to sell and convey the property hereinbefore conveyed and out of the proceeds of the sale thereof, first, to pay the expenses of said foreclosure and sale, including the reasonable solicitor's fees for foreclosing the same and the costs and expenses of selling the same; second, to pay said Wheelock, Carson, Hill, and Keator Lumber Company, respectively, all the costs, damages, and expenses to which they or either of them may have been subjected, including necessary attorney's fees, by reason of their have endorsed and become liable upon said paper to the grantor; and, third, to hold the balance in trust until said liability of each of said grantors shall be extinguished and determined; lastly, to pay any balance that may remain in his hands, if any, to said grantors, it being the intention that the property conveyed hereby shall be under-

8 stood to be for and shall stand for security to each of the parties aforesaid, viz., Wheelock, Carson, Hill, and Keator Lumber Company, alike in proportion to the ultimate liability to which each may be subjected, and that they shall receive the benefit and protection *pro rata* according to the extent of their liability and in proportion thereto.

"And it is further understood and made a part hereof that said grantee may, instead of holding any such funds as he may receive from said sale, if any, apply the same to reducing the amount of said paper by said endorsers signed in proportion to the amount

signed by each, the whole matter to be equitably adjusted so that in case of loss such loss shall be borne by each party *pro rata* in proportion to the present liability of each party, the object being to afford to each of said parties equal and proportional security and protection.

"And it is provided hereby that the said grantor and its successors and assigns may hold and enjoy said premises and the rents and profits thereof until default shall be made in the conditions hereof by the grantor herein."

Which said conveyance was executed under the corporate seal of said corporation by the said Henry H. Hill, as president, and
9 the said Stephen T. Walker, as secretary, by authority of a vote of the directors of said corporation; that said conveyance, after being acknowledged by said president and secretary, was filed for record in the office of the recorder of deeds of the county of Rock Island on the 27th day of June, 1883, and was recorded in book 33 of mortgages, on page 567, a duly certified copy of which your orators will produce at the hearing hereof.

And at the same time, and as a part of the same transaction, the said corporation made and executed its chattel mortgage and conveyed thereby, upon the same trusts in said trust deed stated, to said Hemenway certain of its goods and chattels therein stated, to wit, the goods and chattels enumerated in Schedule "A," thereunto annexed and made a part thereof, which said Schedule "A" is in the words and figures following, to wit:

SCHEDULE "A."

"All of the pig-iron on hand, consisting of about one hundred and seventy-five tons; all of the malleable iron on hand, manufactured and in process of manufacture, consisting of about two hundred and sixty tons, excepting about forty tons sold to the
10 Moline Plow Company, of Moline, Illinois, and about forty tons sold to the Wrought-Iron Range Company, of St. Louis, Mo.; all of the shovels, riddles, bellows, brushes, ladles, shanks, runners, flasks, bottom boards, weights, facings, mouldings, sand, core sand, fire-clay, and all tools used in foundry; all of the patterns in and about the premises; all of the patterns, materials, and tools used in making patterns; all of the annealing pots and bottoms, annealing seal tools, and movable machinery used in and about the annealing room; all of the tools and machinery used in and about the finishing room; all of the oils, tank, asphaltum, and blocking in and about the premises; all of the tools and movable machinery in and about the engine-room; all of the fuel, consisting of wood, soft coal, Lehigh coal, and coke, in and about the premises; all of the fire-brick and common brick in and about the premises; two horses and harness; two express wagons and one farm wagon; all the scrap-iron in and about the premises."

Which said conveyance was executed under the corporate seal of said corporation by the said Henry H. Hill, as president, and the said Stephen T. Walker, as secretary, by the authority of a
11 vote of the directors of said corporation; that said convey-

ance, after having been acknowledged by said president and secretary, was filed for record in the office of the recorder of deeds of the county of Rock Island, on the 27th day of June, 1883, and was recorded in book 33 of mortgages, on page 567, a duly certified copy whereof your orators will produce at the hearing hereof.

Your orators further show that the said George H. Hill was compelled to pay and did pay the sum of twenty thousand ($20,000.00) dollars in four notes of five thousand ($5,000.00) dollars each, on which said notes he was accommodation endorser and guarantor for the said The Moline Malleable Iron Works, and of which said notes the said The Moline Malleable Iron Works was maker. Said notes were dated as follows: April —, 1883, payable in ninety days from date; one dated April 25th, 1883, due four months after date; one dated April 30th, 1883, due ninety days after date, and one dated May 28th, 1883, due ninety days after date, all of said notes being payable to the order of George H. Hill and S. T. Walker, payable with seven (7) per cent. interest after maturity. All of said notes
12 were secured by the trust deed and chattel mortgage aforesaid. The said The Moline Malleable Iron Works failed to pay the said notes at maturity, and the said George H. Hill was compelled to pay the same by reason of his endorsement thereon and guaranty thereof for the benefit of the said The Moline Malleable Iron Works, said endorsement and guaranty being the same referred to and covered by said trust deed and chattel mortgage; and said George H. Hill did pay all of said notes, by reason whereof the said The Moline Malleable Iron Works became indebted to said George H. Hill in the said sum of twenty thousand dollars, with interest as aforesaid.

Your orators further show that the said The Moline Malleable Iron Works defaulted in the payment of said notes and the performance of its obligations, as set forth in said trust deed and chattel mortgage; that the conditions of said trust deed and chattel mortgage are broken and the same have become absolute, and the owners and holders of the said twenty thousand dollars are entitled to a foreclosure of said trust deed and chattel mortgage and the sale of said propery to satisfy the same.

Your orators further show that for a good consideration the
13 said George H. Hill did, on the 12th day of April, 1884, sell and convey his entire interest in and right and title to said trust deed and chattel mortgage and said indebtedness of twenty thousand dollars secured by said trust deed and chattel mortgage, as aforesaid, unto your orator, William S. Mellen, in trust for the sole use and benefit of Sophia H. Boyd, who unites with said Mellen in this bill of complaint; and your orators are the sole owners of said claim of twenty thousand ($20,000.00) dollars and all interest in said trust deed and chattel mortgage securing the same formerly owned by said George H. Hill.

Your orators further show that said sum of twenty thousand ($20,000.00) dollars is justly due and unpaid to them, and they are entitled to have the said trust deed and chattel mortgage foreclosed and the property covered thereby sold and the proceeds of said sale

applied to the payment of said debt in pursuance of and in accordance with the terms of said trust deed and chattel mortgage securing the same as aforesaid.

Your orators further show unto this court that the National Furnace Company, pretending and claiming to be a corporation of the State of Wisconsin and pretending and claiming to be a general and unsecured creditor of the said The Moline Malleable Iron
14 Works, did, on the 2nd day of July, 1883, file its bill in equity in this court, No. 18625 on the general docket of this court, which said bill of complaint was in substance as follows:

"The National Furnace Company, a corporation existing under and by virtue of the laws of the State of Wisconsin, doing business at De Pere and Green Bay, in said State of Wisconsin, brings this its bill against the Moline Malleable Iron Works, a corporation existing under and by virtue of the laws of the state of Illinois, and a citizen of the State of Illinois and a resident of the northern district of Illinois, located and doing business at Moline, within said northern district of Illinois, and Henry H. Hill, Stephen F. Walker, A. L. Carson, Charles F. Hemenway, S. W. Wheelock, and W. J. Entriken, administrator of the estate of Benjamin Hill, deceased, all of the city of Moline, in the county of Rock Island and State of Illinois, and residents of the northern district of Illinois, and George H. Hill, of Cincinnati, in the State of Ohio, and a citizen of the State of Ohio, and the J. S. Keator Lumber Company, a corporation existing under the laws of the State of Illinois, and a citizen of the State of Illinois, located and doing busi-
ness at Moline, within the northern district of Illinois; that
15 the said Moline Malleable Iron Works was indebted to it, the complainant, on certain promissory notes, to the amount of twenty-two thousand three hundred and ninety and $\frac{21}{100}$th-(22,390.$\frac{21}{100}$th-) dollars, which said notes were made by the said Moline Malleable Iron Works for iron sold and delivered by the said National Furnace Company to the maker of said notes for its use and at its request."

Said bill of said National Furnace Company also set forth the names of the stockholders and officers and directors of said Moline Malleable Iron Works as follows: Henry H. Hill, George H. Hill, Stephen T. Walker, and W. J. Entriken, administrator of the estate of Benjamin Hill, as stockholders, and the directors were the said Henry H. Hill, George H. Hill, Stephen T. Walker, and W. J. Entriken and one Amaziah L. Carson, and also set forth the amount of the capital stock of said Moline Malleable Iron Wooks as twenty-five thousand ($25,000.00) dollars, and that the total indebtedness of said Moline Malleable Iron Works was at the date of filing said bill one hundred thousand ($100,000.00) dollars, and that all of said indebtedness was created by said Moline Malleable Iron Works with
the knowledge and assent of each and all of the aforesaid
16 directors and officers, and that under the laws of Illinois each and all of said directors and officers were severally liable for so much of said indebtedness as was in excess of said capital stock, said liability being to all of the creditors of said Moline Malleable

Iron Works, of whom complainant was one, and for the benefit of all said creditors said bill in equity was filed.

Said bill further set forth the giving of said trust deed and chattel morgage as aforesaid, and the terms thereof as aforesaid, and averred that at the time the same were given and for some time prior thereto the said Moline Malleable Iron Works was insolvent, and that said trust deed and chattel mortgage were null and void as against the general creditors of the said Moline Malleable Iron Works for the following reasons, to wit:

"First. Because they constitute a partial assignment for the benefit of creditors by which said corporation seeks to prefer the endorsers therein named in preference to the other creditors of the corporation, which said attempt your orator is advised and believes is fraudulent and unlawful under the statutes of the State of Illinois.

"Second. Because the said assignment does not purport to put the said assignee in possession of said property, and the
17 said assignee has not actually taken possession thereof and has not given bond to the county court of Rock Island county as provided by law in the case of assignments for the benefit of creditors, and it is not intended to file such bond or distribute the said assigned property under the provisions of the statutes in such cases made and provided.

"Third. That the two assignments constitute a part of the same transaction, and that the chattel mortgage upon the personal property therein described is void as against the creditors of the said corporations, because the said corporation has been and still is allowed by the said assignee to manage, control, and use the property therein described in the usual and ordinary course of business to the same extent and in the same manner as the same were used by the said corporation before the execution of the said chattel mortgage.

"Fourth. Because the said documents operate and were designed to operate, to hinder, and delay the creditors of the said Moline Malleable Iron Works in the collection of their debts.

"Fifth. Because as against the fair and honest creditors of the said corporation the preference sought to be given to the said
18 Hill and the said Carson, two of the directors of the said corporation, is null and void.

"Sixth. For divers other reasons your orator has been advised that all of the aforesaid acts and things of the said Moline Malleable Iron Works as against your orator and the other *bona fide* creditors of said corporation are null and void."

And said bill further alleged that to carry out the alleged fraudulent purposes aforesaid of devoting said property to the payment of the debts of said directors and the other parties the said Moline Malleable Iron Works and its officers threatened that if any of the creditors of said company should institute legal proceedings to collect their debts, then said company would make an assignment of all its property for the benefit of creditors.

And the prayer of said bill was as follows: "Inasmuch, therefore, as your orator is without remedy at common law and can institute

no proceedings on the law side of this court or in any other court which will save and protect its rights in the premises, your orator asks the aid and protection of this court, and to the end that the said corporation may be dissolved and its business closed up, and that a receiver therefor may be appointed to sue in all courts and do
19 all things necessary to the closing up of its affairs as commanded by the decree of this court, and that until the hearing hereof an injunction may be issued against the said corporation, The Moline Malleable Iron Works, its stockholders, directors, and officers, enjoining them from making any assignment, transfer, or other disposition of its property or any portion thereof until the further order of this court, and that on hearing hereof such injunction may be made perpetual, and also that until the final hearing hereof a receiver may be appointed to take charge of and manage the property of the said corporation under the orders of this court with the usual powers of receivers in such cases that an account may be had and taken under the direction of this court, and the amount of the assets of said corporation applicable to the payment of its debts may be ascertained, and that the same may be divided among such of its creditors as may seem to be equitably entitled thereto; that the amount for which the directors and officers shall be personally and individually liable to the creditors of the said corporation may be ascertained and adjudicated by this court, and the said stockholders and officers decreed to pay the same to the
20 said receiver, and that the same may be distributed among the creditors of said corporation entitled thereto; that the aforesaid transfers and conveyances executed by the said Moline Malleable Iron Works to the said Hemenway may be held and adjudged fraudulent and void as against your orator and the other creditors of said corporation, and that your orator may have such other, further, and different relief as may be agreeable to equity and good conscience—

"May it please your honors to grant unto your orator the usual writ of subpœna in such cases, directed to the said Moline Malleable Iron Works, Henry H. Hill, Stephen T. Walker, George H. Hill, W. J. Entriken, administrator of the estate of Benjamin Hill, deceased, S. W. Wheelock, A. L. Carson, the J. S. Keator Lumber Company, and Charles T. Hemenway, commanding them and each of them on a certain day and under a certain penalty to be and appear before this honorable court, then and there to answer the premises, but not under oath, the answer under oath of each of the said defendants being hereby waived to, stand to abide by, and perform such order and decree in the premises as may be just and agreeable to equity and good conscience."

That by a supplemental bill filed July 9th, 1883, complain-
21 ant set forth that after the filing of his original bill and on the 5th day of July, 1883, one of the said promissory notes for one thousand ($1,000.00) dollars had become due and payable and remained wholly unpaid, and that the remainder of said notes, seventeen in number, for various amounts, would mature at various dates between July 20th, 1883, and September 23rd, 1883, and

complainant offered to bring them in and surrender the same as directed by the court.

And by another supplemental bill, filed July 30th, 1883, complainant set forth that after the filing of his bill of complaint two suits at law had been begun against the Moline Malleable Iron Works by creditors thereof in the county court of Rock Island county, and that judgments would be rendered in said actions and executions levied thereunder on the property of said debtor, and praying that said suitors might be restrained from suing out any executions on said judgment against said debtor and from levying the same on its property.

No other supplemental bills were filed in the cause, and the material contents of said bill and two supplemental bills are substantially set forth as above.

Said bill and supplemental bills did not contain and do
22 not contain any averment that the said National Furnace Company, complainant therein, had any specific or existing lien on or claim to the property covered by said trust deed or chattel mortgage. They did not aver that the indebtedness owing to complainant and sued on or any part of it was due. They did not aver that any writ of attachment or execution or other process of law had been issued whereby any lien on or claims to any of said property had been obtained by said complainant against the property covered by said trust deed and chattel mortgage.

Your orators further show that complainant's debt sued on was in fact not due, nor any part thereof, and said complainant had not obtained a judgment at law on said debt, and had not secured the issuing of any writ of attachment or other process of law against said property, and had not exhausted its legal remedies for the collection of its debt, and had no lien on or claim to said property when said bill of complaint was filed, and, as your orators are advised and believe and so charge, had no right to enter suit to set aside said trust deed and chattel mortgage, not having exhausted its legal remedies for the collection of its said claims, and
23 having no lien on or claim to said property and no interest therein whereby said court, on its behalf, could or had a right to assume jurisdiction of said cause, and of the said George H. Hill's interest in said property or of said property, or to compel the said Hill at any time to plead, answer, or demur thereto, or to make any order or decree in the premises affecting said property or the interest of said Hill therein.

Your orators further show that after the filing of said bills and before the final hearing of said cause and before any order or process on said bills was made or served on the said George H. Hill, and while said court had not acquired and was without any jurisdiction over the person of said Hill or his interest in said trust deed and chattel mortgage and the property therein described, and when it had no jurisdiction in the premises, did appoint one Robert E. Jenkens as receiver to take possession of and sell all of said property and bring the proceeds thereof into court to abide the further order of the court, and said Jenkens did there and then and thereupon enter into and

take possession of all of said property covered by said trust
24 deed and chattel mortgage; that on the 22nd day of February, 1884, and before any hearing or trial of said cause or its merits, said receiver, acting under the orders of said court and in pursuance thereof, did sell said property to said Stillman W. Wheelock for the sum of thirty thousand ($30,000.00) dollars, which sale was, on the 3d of March, 1884, by said court confirmed and pos-ession of said property was then, under the order of said court, delivered by said receiver to said Wheelock, who is now in pos-ession thereof and claims to be the owner of the same; said cause has not yet been heard on its merits, and the same is still pending in this court, and no action has been taken by said court setting aside said trust deed and chattel mortgage.

Your orators further show that after the sale of said property as aforesaid and on the 3rd day of March, 1884, the said court, without any authority and for the first time, made an order on the said George H. Hill, as a non-resident defendant, purporting to be under section 738 of the Revised Statutes of the United States, to appear and plead to the original and supplemental bills on or before
25 April 15th, 1884, and to be defaulted unless he so appeared; but said Hill did not appear and has never entered his appearance in said cause, and has never consented to said courts taking jurisdiction of said cause or his interest in said property, and has been since the filing of said bill and is now a resident and citizen of the State of Ohio and a non-resident of said northern district of Illinois, and has not been in said district since the filing of said bill, and said bill sets forth that said Hill is a non-resident of the State of Illinois.

That on said 15th day of April your orator, William S. Mellen, as trustee as aforesaid, by and with the consent and approval of said Sophia H. Boyd, as the owners of the entire interest of said George H. Hill in and to said trust deed and chattel mortgage, as hereinbefore set forth, appeared before said court and moved the court for leave to appear in said cause and be made a party thereto and be given leave to plead to protect his rights in the premises, which motion the court overruled and refused your orator leave to appear in said cause or to be a party thereto or take any action therein
26 to protect his rights in the premises.

Your orators further aver that said order of said court selling said property was wholly null and void; that at the time the same was made the court had not acquired jurisdiction of the said property nor of the person of said Hill or his interest in the property so sold; that said court did not acquire by said cause jurisdiction to enquire into the validity of said trust deed and chattel mortgage, nor jurisdiction over the person of said Hill, nor of the property covered by and embraced in said deed and chattel mortgage, and all of its orders in the premises as affecting said property and the said Hill or his interest in said property and the interest of your orators thereunder were null and void and without authority in the premises.

Your orators further aver that the said Charles F. Hemenway, as

trustee under said trust deed and chattel mortgage, has wholly failed and refused to protect the interest of said Hill and your orators in and to said property, and has sanctioned the illegal sales, as aforesaid to be made in violation of his duties as trustee, and without taking any steps or doing anything toward the protection of
27 the interest represented by said Hill and your orators in and to said property, and has conspired with the other parties herein to injure the rights of your orators as aforesaid.

Your orators further show that the said Stillman W. Wheelock, Amaziah L. Carson, Jeremiah S. Keator, and Ben. C. Keator, partners as J. S. Keator & Son, and said Stephen T. Walker, claim to have some interest in said trust deed and chattel mortgage and the property therein set forth, the extent and nature of which your orators are not advised of, and they ask that said parties may be compelled to answer, setting forth the same, but not under oath, the said oath being hereby waived.

Inasmuch as you your orators can only have adequate relief in this honorable court, they pray that said trust deed and chattel mortgage may be foreclosed, the liens thereunder and claims to said property may be ascertained and determined, and their amount and priorities fixed; that said property may be sold and the proceeds of said sale distributed as the court shall find said parties entitled thereto; that the parties now in possession of said property be restrained from in any manner disposing of or incumbering the
28 same until the final hearing of this cause, and if it be found that they have disposed of any part of the same they may be compelled to account for the value thereof, and for all the rents, issues, and profits thereon; that, pending the determination of this cause, a receiver may be appointed to take possession of all of said property, and that your orators may have such other and further relief as in equity and good conscience they may be entitled.

May it please your honors to grant unto your orators the usual writ of subpœna in such cases, directed to the said Moline Malleable Iron Works, Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson, Jeremiah S. Keator, and Ben. C. Keator, late partners as J. S. Keator & Son, commanding them and each of them, on a certain day and under a certain penalty, to be and appear before this honorable court, then and there to answer the premises, but not under oath, the answer under oath of each of said defendants being hereby waived, to stand to, abide by, and perform such order and decree in the premises as may be just and agreeable to equity and good conscience.

WM. S. MELLEN, *Trustee.*
SOPHIA HILL BOYD.

29 CHARLES C. LINTCHICUM &
McDOUGALL & LONGWORTH,
Solicitors & of Counsel.

STATE OF OHIO, }
County of Hamilton, } *ss:*

William S. Mellen, being duly sworn, says that he is one of the complainants in the foregoing bill of complaint named; that he has read said bill and knows the contents thereof, and the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WM. S. MELLEN.

Sworn to before me and subscribed in my presence this 1st day of May, 1884.

[SEAL.] WILLIS M. KEMPER,
Notary Public, Hamilton County, Ohio.

40 cts. paid by affiant.

W. M. K.

(Endorsed:) Filed May 5, 1884. W. H. Bradley, clerk.

30 On the same day, to wit, on the fifth day of May, 1884, there issued out of said clerk's office a writ of subpœna in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA }
Northern District of Illinois, } *ss:*

The United States of America to the Moline Malleable Iron Works, a corporation, etc., Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson, Jeremiah S. Keator, and Ben. C. Keator, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of June next, to answer the bill of complaint of William S. Mellen, who sues as trustee, and Sophia H. Boyd, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the
31 Supreme Court of the United States of America, at Chicago aforesaid, this fifth day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th.

[SEAL.] W. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they and each of them shall enter their appearance in the

clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against them as confessed and a decree entered accordingly.

W. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within writ, within my district, in the following manner, to wit: Upon the Moline Malleable Iron Works, a corporation, by delivering a true copy of this writ to H. H. Hill, president of said company therein named, on the 13th day of May, A. D. 1884; also upon Charles F. Hemenway, therein named, on the 13th day of May, A. D. 1884; also upon S. W. Wheelock, therein named, on the 13th day of May, A. D. 1884; also upon A. L. Carson, therein named, on the 13th day of May, A. D. 1884; also upon J. S. Keator, therein named, on the 13th day of May, A. D. 1884; also upon B. C. Keator, therein named, on the 13th day of May, A. D. 1884, by personally delivering to each of them a true copy of the same on the aforesaid day.

32 I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true copy for each of them, at their usual place of abode, with an adult person and a member of their family, to wit, upon S. T. Walker, on the 13th day of May, A. D. 1884, with Mrs. S. T. Walker, his wife.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *Deputy.*

Endorsed: Filed May 28th, A. D. 1884. Wm. H. Bradley, clerk.

Afterwards, to wit, on the thirty-first day of May, 1884, came S. W. Wheelock and others, by their solicitors, and filed in said clerk's office their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

In the United States Circuit Court for the Northern District of Illinois. In Chancery.

WILLIAM S. MELLEN *et al.*
vs.
THE MOLINE MALLEABLE IRON WORKS, STILMAN W. WHEELOCK, A. L. Carson, C. F. Hemenway, Jeremiah S. Keator, and Ben. C. Keator, Partners, etc., and Stephen T. Walker, Def'ts.

33 We hereby enter the appearance of said Stillman W. Wheelock, A. L. Carson, Charles F. Hemenway, and Jeremiah S. Keator & Ben. C. Keator, partners, etc., in the above-entitled cause.

May 31st, 1884.

OSBORN & LYNDE,
Solicitors for said Def'ts.

Endorsed: Filed May 31, 1884. W. H. Bradley, cl'k.

34 Afterwards, to wit, on the seventh day of July, 1884, came Stillman W. Wheelock and others, by their solicitors, and filed in said clerk's office their plea to the bill in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

United States Circuit Court, Northern District of Illinois. In Chancery.

WILLIAM S. MELLEN *et al.*, Complainants,

vs.

THE MOLINE MALLEABLE IRON WORKS *et al.*, Defendants.

The joint and several plea of Stillman W. Wheelock, Amaziah L. Carson, Charles F. Hemenway, Jeremiah S. Keator, and Ben. C. Keator, who are defendants in said cause, to the bill of complaint of William S. Mellen and Sophia H. Boyd, defendants.

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are therein set forth and alleged, for plea to so much of the said bill as prays a foreclosure of the said trust deed and chattel mortgage executed and delivered by said Moline Malleable Iron Works to said
35 Charles F. Hemenway, trustee, and the ascertainment of the liens thereunder, and the claims to the property thereby conveyed, and the sale of the said property and the distribution of the proceeds of such sale among the parties found by the court entitled to share therein, and the payment to said complainants of the portion thereof to which said George H. Hill might be found entitled, say—

That long prior to the time when said George H. Hill assigned and transferred to said complainant Mellen his interest in said trust deeds, as alleged in the said bill of complaint, to wit, on the 28th day of November, 1883, the defendant Stillman W. Wheelock, by leave of this honorable court, filed his cross-bill of complaint in the cause pending in this court, in which the National Furnace Company was the complainant and said Moline Malleable Iron Works, Stillman W. Wheelock, George H. Hill, Amaziah L. Carson, Charles F. Hemenway, Henry H. Hill, Stephen T. Walker, William J. Entriken, and the J. S. Keator Lumber Company were the defendants, and made parties defendant to said cross-bill, said Moline Malleable Iron Works, the National Furnace Company, George H. Hill, Charles F. Hemenway, and said Carson, and therein and thereby prayed, among other things, that the said trust deed and chattel mortgage might be foreclosed, the liens thereunder ascertained,
36 the property conveyed thereby sold and the proceeds of such sale applied in satisfaction of and to relieve said Wheelock, Carson, and said Lumber Company from the liabilities assumed by

them as endorsers for said Moline Malleable Iron Works; that thereupon, to wit, on the 28th day of November, 1883, it was ordered by this honorable court, as appears of record in this court, that the said National Furnace Company, the Moline Malleable Iron Works, Hemenway, Carson, and Hill plead, answer, or demur to the said cross-bill on or before the 20th day of December, 1883, and that a copy of said order be served on said Hill on or before December 5th, 1883, and that in case said Hill did not appear and plead, answer or demur, to said cross-bill as aforesaid the same should be taken as confessed by him; that said order was duly served upon said Hill on the 1st day of December, 1883, to wit, long prior to the making of the assignment to said Mellen; that the said defendants, The National Furnace Company, Hemenway, and Carson, answered said cross-bill, as directed by said order, but that said Hill and the said Moline Malleable Iron Works failed to appear in said cause and to plead, answer, or demur to said cross-bill therein, and that thereafter, to wit, on the 23rd day of April, 1884, long prior to the
37 filing of the said bill of complaint by the said William H. Mellen, by the order of this court entered in said cross-cause of said Wheelock, and now appearing of record in this court, it was adjudged and decreed that the said cross-bill of the said Wheelock be taken as confessed by said George H. Hill and said Moline Malleable Iron Works.

And that thereafter, to wit, on the 26th day of June, 1884, this court having full jurisdiction of said cross-bill and the parties defendant thereto, a final decree was entered by this court upon said cross-bill, which now appears of record in this court, and it was therein and thereby, among other things, decreed that said trust deed and chattel mortgage were valid as to said Wheelock, Carson, and the J. S. Keator Lumber Company, and that they were entitled to have and receive the proceeds of the sale of the property conveyed by said instruments, which is mentioned in said bill of complaint of said Mellen and Boyd, but that the same were invalid as to said Hill, and that he was not entitled to share in the proceeds of the said sale.

All of which matters and things these defendants do aver and plead in bar to so much of the said complainants' bill as hereinbefore particularly mentioned, and pray judgment of this
38 honorable court whether they should make any further answer to so much of the said bill as is hereinbefore pleaded to, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

STILLMAN W. WHEELOCK,
AMAZIAH L. CARSON,
CHARLES F. HEMENWAY,
JEREMIAH S. KEATOR,
BEN. C. KEATOR,
By SAM'L A. LYNDE, *Their Solicitor.*

CHAS. M. OSBORN, *Of Counsel.*

which said attempt your orator is advised and believes is fraudulent and unlawful under the statutes of the State of Illinois.

Second. Because the said assignment does not purport to put the said assignee in possession of said property, and the said assignee has not actually taken possession thereof, and has not given bond to the county court of Rock Island county as provided by law in the case of assignments for the benefit of creditors, and it is not intended to file such bond or distribute the said assigned property under the provisions of the statute in such case made and provided.

Third. That the two assignments constitute a part of the
44 same transaction, and that the chattel mortgage upon the personal property therein described is void as against the creditors of the said corporation, because the said corporation has been and still is allowed by the said assignee to manage, control, and use the property therein described in the usual and ordinary course of business to the same extent and in the same manner as the same were used by the said corporation before the execution of the said chattel mortgage.

Fourth. Because the said documents operate and were designed to operate to hinder and delay the creditors of the said Moline Malleable Iron Works in the collection of their debts.

Fifth. Because as against the fair and honest creditors of the said corporation the preference sought to be given to the said Hill and the said Carson, two of the directors of the said corporation, is null and void.

Sixth. For divers other reasons your orator has been advised that all of the aforesaid acts and doings of the said Moline Malleable Iron Works as against your orator and the other *bona fide* creditors of said corporation are null and void.

And said bill further alleged that to carry out the alleged fraudulent purposes aforesaid of devoting said property to the payment of the debts of said directors and other parties the said Moline Malleable Iron Works and its officers threatened that if any of the
45 creditors of said company should institute legal proceedings to collect their debts, then said company would make an assignment of all its property for the benefit of creditors.

And the prayer of said bill was as follows:

Inasmuch, therefore, as your orator is without remedy at common law and can institute no proceedings on the law side of this court which will save and protect its rights in the premises, your orator asks the aid and protection of this court, and to the end that the said corporation may be dissolved and its business closed up and that a receiver may be appointed to sue in all courts and do all things necessary to the closing up of its affairs, as commanded by the decree of this court, and that until the hearing thereof an injunction may be issued against the said corporation, The Moline Malleable Iron Works, its stockholders, directors, and officers, enjoining them from making any assignment, transfer, or other disposition of its property or any portion thereof until the further order of this court, and that on hearing hereof such injunction may be made

perpetual, and also that until the final hearing hereof a receiver may be appointed to take charge of and manage the property of the said corporation under the orders of this court, with the usual powers of receivers in such cases; that an account may be had and taken under the direction of this court, and the amount of the assets of said corporation applicable to the payment of its debts may be
46 ascertained, and that the same may be divided among such of its creditors as may seem to be equitably entitled thereto; that the amount for which the directors and officers shall be personally and individually liable to the creditors of the said corporation may be ascertained and adjudicated by this court and the said stockholders and officers decreed to pay the same to the said receiver, and that the same may be distributed among the creditors of said corporation entitled thereto; that the aforesaid transfers and conveyances executed by the said Moline Malleable Iron Works to the said Hemenway may be held and adjudged fraudulent and void as against your orator and the other creditors of said corporation, and that your orator may have such other, further, and different relief as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orator the usual writ of subpœna in such cases, directed to the said Moline Malleable Iron Works, Henry H. Hill, Stephen T. Walker, George H. Hill, W. J. Entriken, administrator of the estate of Benjamin Hill, deceased; S. W. Wheelock, A. L. Carson, the J. S. Keator Lumber Company, and Charles F. Hemenway, commanding them and each of them, on a certain day and under a certain penalty, to be and appear before this honorable court, then and there to answer the premises, but not under oath, the answer under oath of each of the said defendants being hereby waived, to stand to, abide by, and perform such
47 order and decree in the premises as may be just and agreeable to equity and good conscience.

That by a supplemental bill filed July 9th, 1883, complainant set forth that after the filing of his original bill and on the 5th day of July, 1883, one of the said promissory notes for one thousand ($1,000.00) dollars had become due and payable and remained wholly unpaid, and that the remainder of said notes, seventeen in number, for various amounts, would mature at various dates between July 20th, 1883, and September 23rd, 1883, and complainant offered to bring them in and surrender the same as directed by the court.

And by another supplemental bill filed July 30th, 1883, complainant set forth that after the filing of his bill of complaint two suits at law had been begun against the Moline Malleable Iron Works by creditors thereof in the county court of Rock Island county, and that judgments would be rendered in said actions and executions levied thereunder on the property of said debtor, and praying that said suitors might be restrained from suing out any executions on said judgment against said debtor and from levying the same on its property. No other supplemental bills were filed in the cause, and the material contents of said bill and two supplemental bills are substantially set forth as above. Said bill and sup-

plemental bills did not contain any averment that the said
48 National Furnace Company, complainant therein, had any specific or existing lien on or claim to the property covered by said trust deed or chattel mortgage; they did not aver that the indebtedness owing to the complainant and sued on or any part of it was due; they did not aver that any writ of attachment or execution or other process of law had been issued whereby any lien on or claim to any of said property had been obtained by said complainant against the property covered by said trust deed and chattel mortgage.

Your orators further show that complainant's debt sued on was in fact not due, nor any part thereof, and said complainant had not obtained a judgment at law on said debt, and had not secured the issuing of any writ of attachment or other process of law against said property, and had not exhausted its legal remedies for the collection of its debt, and had no lien on or claim to said property when said bill of complaint was filed, and as your orators are advised and believe and so charge, had no right to enter suit to set aside said trust deed and chattel mortgage, not having exhausted its legal remedies for the collection of its said claims, and having no lien on or claim to said property and no interest therein whereby said court on its behalf could or had a right to assume jurisdiction of said cause and of the said George H. Hill's interest in said property or of said property, or to compel the said Hill at any time to plead, answer or demur thereto, or to make any order or decree in
49 the premises affecting said property or the interest of said Hill therein."

Second exception. For that the whole of the following paragraphs of the said bill are impertinent, the paragraphs referred to by this exception being as follows, to wit:

"Your orators further show that after the filing of said bills and before the final hearing of said cause and before any order or process on said bills was made or served on said George H. Hill, and while said court had not acquired and was without jurisdiction over the person of said Hill or his interest in said trust deed and chattel mortgage and the property therein described, and when it had no jurisdiction in the premises, did appoint one Robert E. Jenkins as receiver, to take possession of and sell all said property and bring the proceeds thereof into court, to abide the further order of the court, and said Jenkins did there and then and thereupon enter into and take possession of all of said property covered by said trust deed and chattel mortgage; that on the 22nd day of February, 1884, and before any hearing or trial of said cause on its merits, said receiver, acting under the orders of said court, and in pursuance thereof, did sell said property to said Stillman W. Wheelock for the sum of thirty thousand ($30,000.00) dollars, which sale was, on the 3rd day of March, 1884, by said court confirmed and possess-
50 sion of said property was then under the order of said court delivered by said receiver to said Wheelock, who is now in possession thereof and claims to be the owner of the same.

Said cause has not yet been heard on its merits, and the same is still pending in this court, and no action has been taken by said court setting aside said trust deed and chattel mortgage. Your orators further show that after the sale of said property as aforesaid, and on the 3d day of March, 1884, the said court, without any authority, and for the first time, made an order on the said George H. Hill, as a non-resident defendant, purporting to be under section 738 of the Revised Statutes of the United States, to appear and plead to the original and supplemental bills on or before April 15th, 1884, and to be defaulted unless he so appeared; but said Hill did not appear, and has never entered his appearance in said cause, and has never consented to said court's taking jurisdiction of said cause or his interests in said property, and has been, since the filing of said bill, and is now a resident and citizen of the State of Ohio and a non-resident of the northern district of Illinois, and has not been in said district since the filing of said bill, and said bill sets forth that said Hill is a non-resident of the State of Illinois.

That on the 15th day of April your orator, William S. Mel-
51 len, as trustee, as aforesaid, by and with the consent and approval of said Sophia H. Boyd, as the owners of the entire interest of said George H. Hill in and to said trust deed and chattel mortgage, as hereinafter set forth, appeared before said court and moved the court for leave to appear in said cause and be made a party thereto, and be given leave to plead to protect his rights in the premises, which motion the court overruled and refused your orator leave to appear in said cause or to be a party thereto, or take any action therein to protect his rights in the premises.

Your orators further aver that said order of said court selling said property was wholly null and void; that at the time the same was made the court had not acquired jurisdiction of said property nor of the person of said Hill or his interest in the property so sold; that said court did not acquire by said cause jurisdiction to enquire into the validity of said trust deed and chattel mortgage, nor jurisdiction over the person of said Hill, nor of the property covered by and embraced in said trust deed and chattel mortgage, and all of its orders in the premises as affecting said property and the said Hill or his interest in said property and the interest of your orators thereunder were null and void and without authority in the premises."

Third exception. For that the following portion of the prayer of said bill of complaint is impertinent, to wit:

"That the parties now in possession of said property be re-
52 strained from in any manner disposing of or incumbering the same until the final hearing of this cause, and if it be found that they have disposed of any part of the same they may be compelled to account for the value thereof, and for all the rents, issues, and profits thereon; that, pending the determination of this cause, a receiver may be appointed to take possession of all of said property."

In all of which particulars these defendants except to the said

bill as impertinent, and humbly pray that the said impertinent matter may be expunged therefrom.

STILLMAN W. WHEELOCK,
AMAZIAH L. CARSON,
CHAS. F. HEMENWAY,
JEREMIAH L. KEATOR,
BEN. C. KEATOR,
By SAM'L A. LYNDE, *Their Solicitor.*

CHARLES M. OSBORN,
SAM'L A. LYNDE,
Counsel for Defendants.

Endorsed: Filed July 7th, 1884. Wm. H. Bradley, clerk.

53 Afterwards, to wit, on the twenty-first day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs.
MOLINE MALLEABLE IRON WORKS *et al.* } In Chancery.

On motion of complainants' solicitor it is ordered that the exceptions and plea filed herein to the bill of complaint be referred to Henry W. Bishop, master in chancery, to examine and report thereon to this court.

Afterwards, to wit, on the thirteenth day of April, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs.
MOLINE MALLEALE IRON WORKS *et al.* } In Chancery.

54 On motion of complainants' solicitor it is ordered that the order entered herein on the twenty-first day of October, 1884, referring this cause to Henry W. Bishop, master in chancery, be set aside; and it is further ordered that the exceptions to the bill of complaint herein be referred to E. B. Sherman, master in chancery, for examination and report.

Afterwards, to wit, on the sixth day of May, 1885, came E. B. Sherman, one of the masters in chancery of said court, and filed in said clerk's office his report in said entitled cause, which said report is in the words and figures following, to wit:

Master's Report.

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

WILLIAM S. MELLEN *et al.*
vs.
MOLINE MALLEABLE IRON WORKS *et al.*

The undersigned, master in chancery, to whom, by an order entered therein on the 13th day of April, A. D. 1885, the above-entitled cause was referred to examine the bill filed therein and the exceptions of certain of the defendants filed thereto, respectfully reports that said cause was set down for hearing before the said master at his office, room 70, Government building, Chicago, as such
55 master, on Friday, April 24th, 1885, at 10 o'clock a. m.; that he was then and there attended by Thomas McDougall and C. C. Lenthicum, solicitors for said complainants, and by Samuel A. Lynde, solicitor for said defendants, so excepting, and having examined said bill and the exceptions taken thereto, and having heard arguments by counsel, the master finds that said exceptions are not well taken.

Respectfully submitted.

E. B. SHERMAN,
Master as Aforesaid.

Chicago, May 6th, 1885.

Endorsed: Filed this 6th day of May, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the eleventh day of June, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs.
THE MOLINE MALLEABLE IRON WORKS *et al.* } In Chancery.

On motion leave is given defendants to withdraw their plea herein and to file another plea by consent of the complainants, and,
56 on motion of complainants' solicitors, it is ordered that the master's report filed herein on the sixth of May last be, and the same is, confirmed.

On the same day, to wit, on the eleventh day of June, 1885, came Stillman W. Wheelock and others, by their solicitors, and filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

57 United States Circuit Court, Northern District of Illinois.

WILLIAM S. MELLEN *et al.*

vs.

THE MOLINE MALLEABLE IRON WORKS *et al.*

The joint and several plea of Stillman W. Wheelock, Amaziah L. Carson, Charles F. Hemenway, Jerman S. Keator, and Ben. C. Keator, defendants, to the bill of complaint of William S. Mellen and Sophia H. Boyd, complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint mentioned and contained to be true in such manner and form as the same are therein set forth and alleged, for plea to the said bill of complaint say—

That long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen in trust, for the use and benefit of said Sophia H. Boyd, his interest in said trust deed and chattel mortgage, as alleged in said bill of complaint, to wit, on the 2nd day of July, 1883, the said National Furnace Company, in its own behalf and on behalf of all of the creditors of the Moline
58 Malleable Iron Works, exhibited its original bill of complaint in this honorable court and made parties defendant thereto said Moline Malleable Iron Works, Stillman W. Wheelock, George H. Hill, Amaziah L. Carson, Charles F. Hemenway, Henry H. Hill, Stephen T. Walker, Walter J. Entriken, and the J. S. Keator Lumber Company, thereby stating, among other things, that said National Furnace Company was a creditor of said Moline Malleable Iron Works, and that at the time when the said Moline Malleable Iron Works executed the said trust deed and chattel mortgage it was insolvent and its indebtedness was largely in excess of its capital stock, and that its officers and directors had assented to the creation of its indebtedness, and that the said conveyances were fraudulent and void as against creditors of said Moline Malleable Iron Works, and therein and thereby prayed, among other things, that a receiver might be appointed to take charge of and manage the property of the said corporation under the orders of this court, and that the said trust deed and chattel mortgage might be held and adjudged fraudulent and void as against said National Furnace Company and creditors of said Moline Malleable Iron Works; to which said bill these defendants put in their several answers, and said Moline Malleable Iron Works, Henry H. Hill, and Stephen T. Walker interposed their several demurrers; that after exhibiting said bill of complaint, to wit, on the 1st day of August, 1883, upon the application

59 of said National Furnace Company for the preservation of the property of the said corporation pending the said suit, and for the benefit of all parties interested therein and in the proceeds thereof, this honorable court entered an order in said cause, as appears of record in this court, appointing one Robert E. Jenkins receiver of the said Moline Malleable Iron Works, and of its property, and directing him to take and hold possession thereof under the orders of this honorable court, and directing the said Moline Malleable Iron Works to transfer and convey to said receiver its entire property, both real and personal, and to deliver up to said receiver the possession thereof; and that thereupon the said Moline Malleable Iron Works did transfer, convey, and deliver up to said receiver its property and the possession thereof, and said receiver did enter into and take possession thereof.

That thereafter and long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen his interest in said trust deed and mortgage, to wit, on the 28th day of November, 1883, the defendant, Stillman W. Wheelock, by leave of this honorable court, filed his cross-bill of complaint in the aforesaid cause, made parties defendant to said cross-bill said Moline Malleable Iron Works, the National Furnace Company, George H. Hill, Charles F. Hemenway, and said Carson, and therein stated, among
60 other things, that in the year 1880 the said Moline Malleable Iron Works requested that he and the said Carson should become guarantors for it upon its commercial paper, and promised to give them security from any liability to loss by reason thereof by liens on its property, and that at this request and in reliance upon this promise they became guarantors for it from time to time to the amount of about fifty thousand dollars ($50,000); that afterwards, on November 12th, 1882, a resolution was adopted by said corporation authorizing its officers to execute proper instruments to secure them from loss, and that thereafter, at the request of said Wheelock, said corporation executed said trust deed and mortgage, and that neither Wheelock nor Carson were in any way interested in or connected with said company when they incurred this liability at its request; that after the said resolution of November 12th, 1882, was adopted by said company said George H. Hill, who was a stockholder and director, became a guarantor for said company, and that by and through his influence as an officer of said company he was named a beneficiary under said trust deed and mortgage; that the said company was then largely indebted in excess of its capital stock, and that said George H. Hill had assented to the creation of this indebtedness and was liable to its creditors for this excess, and that said trust deed and mortgage were a valid security to said Carson and the J. S. Keator Lumber Company, but that said
61 Hill was not entitled to have and receive the security thereof; that the said property covered by the said trust deed and chattel mortgage was rapidly depreciating in value and should be sold as soon as possible, and praying, among other things, that the said trust deed and chattel mortgage might be declared valid; that the said receiver might be directed to sell immediately the property

described in said trust deed and mortgage, together with the other property of said company, and the proceeds of the sale of the property described in said trust deed and mortgage might be applied in satisfaction of and to relieve said Wheelock, Carson, and J. S. Keator Lumber Company from the liabilities assumed by them as endorsers for said Moline Malleable Iron Works, and the balance disbursed *pro rata* among the creditors of said company; that thereupon, to wit, on the 28th day of November, 1883, it was ordered by this honorable court, as appears of record in this court in said cause, that said National Furnace Company, the Moline Malleable Iron Works, Hemenway, Carson, and George H. Hill plead, answer, or demur to the said cross-bill on or before the 20th day of December, 1883, and that a copy of said order be served on said Hill on or before December 5, 1883, and that in case said Hill did not appear and plead, answer, or demur to said cross-bill as aforesaid the same
62 should be taken as confessed by him; that said order was duly served on said Hill on the 1st day of December, 1883, to wit, long prior to the making of the said assignment to said Mellen; that the said defendants, The National Furnace Company, Hemenway, and Carson, answered said cross-bill, as directed by said order, but that said Hill and said Moline Malleable Iron Works failed to appear in said cause and to plead, answer, or demur to said cross-bill therein, as directed by said order; that thereafter, to wit, on the 22nd day of December, 1883, the said receiver filed his petition in said cause, alleging, among other things, that the property of said Moline Malleable Iron Works in his possession as such receiver (and including therein the said property covered by said trust deed and chattel mortgage) was rapidly depreciating in value, and that for the interests of all persons who might be interested therein and to realize anything for the creditors therefrom it should be sold at once, and praying that he might be authorized to offer the said property for sale, and that thereupon it was ordered, on said petition being filed, by this honorable court, as appears of record in said cause in this court, that the said receiver should offer and advertise for sale, in the manner directed by said order, all of said property, and
63 should report bids therefor to this court.

That thereafter, to wit, on the 20th of February, 1884, said receiver filed in said cause his report, stating therein, in substance, that he had advertised and offered said property for sale in the manner and as directed by said order, and that the highest bid received by him therefor was that of Stillman W. Wheelock, in the amount of thirty thousand dollars ($30,000); that it was thereupon ordered by this honorable court, as appears of record in this court, that all persons should show cause, by the 28th day of February, 1884, why said bid of said Wheelock should not be accepted; and that thereafter, to wit, on the 3rd day of March, 1884, it was ordered by this honorable court in said cause, as appears of record in this court, that the said bid of said Wheelock for said property be accepted, and that said receiver sell and convey the same to him, and that thereupon said receiver did sell and convey the said property to said Wheelock in accordance with said order.

That thereafter, to wit, on the 3rd day of March, 1884, it appearing to this honorable court that said George H. Hill resided beyond the jurisdiction of this court, it was ordered by this honorable court, as appears of record in this court, that said George H. Hill do
64 appear and plead, answer, or demur to the said original and supplemental bill of complaint in said cause on or before the 15th day of April, 1884, and that a copy of said order should be served upon said Hill on or before the 15th day of March, 1884, and that in case he did not appear, plead, answer, or demur to said bill as directed the same should be taken as confessed by him; and that thereafter, to wit, long prior to the time when said Hill sold and conveyed to said Mellen his interest in said trust deed and mortgage, a certified copy of said order was served on said Hill; and thereafter, to wit, on the 22nd day of April, 1884, said Hill not appearing and pleading, answering, or demuring to said original and supplemental bill, as directed by said order, it was ordered by this honorable court in said cause, as now appears of record therein in this court, that said original and supplemental bill be taken as confessed by said Hill.

That thereafter, to wit, on the 23rd day of April, 1884, long prior to the filing of the said bill of complaint by said William H. Mellon, said Hill not having appeared and pleaded, answered, or demurred to said cross-bill, by the order of this court entered in said cause, and now appearing of record in this court, it was ordered
65 that the said cross-bill of said Wheelock be taken as confessed by said George H. Hill; and afterwards, to wit, on the 26th day of June, 1884, the said cause came on to be heard upon the said original and supplemental bills of complaint and answers and replications thereto, and upon the said cross-bill of said Wheelock and the answers and replications thereto, and upon the testimony taken in said cause, and a final decree was then rendered therein, which now appears of record in this court, and it was therein found by this honorable court, among other things, that the indebtedness of said Moline Malleable Iron Works was in excess of its capital stock in the sum of $75,000; that the said trust deed and chattel mortgage were valid in so far as they gave to said Wheelock, Carson, and the J. S. Keator Lumber Company a first lien on the property therein described, and that said George H. Hill was not entitled to any lien or security by reason of said trust deed and mortgage, and that the same were invalid as to him, because the liabilities of said company in excess of its capital stock was incurred while he was one of the directors and its vice-president, and with his knowledge and assent thereto, and because he was named in said trust deed and chattel mortgage as a beneficiary thereunder through his influence
66 and control over said corporation as an officer thereof, and it was thereby decreed, among other things, that said Wheelock, Carson, and the J. S. Keator Lumber Company were entitled to have and receive the proceeds derived from the sale of the property conveyed by said trust deed and mortgage in part satisfaction of the sums paid by them for said company.

All of which matters and things these defendants do aver and plead in bar to said bill of complaint, and do pray judgment of this honorable court whether they should make any further answer to said bill of complaint, and to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

STILLMAN W. WHEELOCK,
AMAZIAH L. CARSON,
CHARLES F. HEMENWAY,
JERMAN S. KEATOR,
BEN. C. KEATOR,
By OSBORN & LYNDE,
Their Solicitors.

CHARLES M. OSBORNE &
SAM'L A. LYNDE, *Counsel.*

67 We do hereby certify that in our opinion the foregoing plea to the said bill of complaint is well founded in point of law.

CHARLES M. OSBORNE &
SAM'L A. LYNDE,
Counsel for said Defendants, Wheelock, Carson, Hemenway, J. S. & B. C. Keator.

STATE OF ILLINOIS, }
Rock Island County, } *ss:*

Stillman W. Wheelock, being first duly sworn, says that he is one of the defendants to the said bill of complaint of William S. Mellen and Sophia H. Boyd, who have joined in the foregoing joint and several plea to said bill of complaint. Affiant further says that he has read the said joint and several plea by him and said Carson, Hemenway, J. S. & B. C. Keator pleaded to said bill of complaint and knows the contents thereof, and that the said plea is not interposed for delay, and that the same is true in point of fact.

STILLMAN W. WHEELOCK.

Subscribed and sworn to before me this third day of June, A. D. 1886.

[NOTARIAL SEAL.] EUGENE LEWIS,
Notary Public.

(Endorsed:) Filed June 11th, 1885. Wm. H. Bradley, cl'k.

68 Afterwards, to wit, on the fifth day of October, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs. } In Chancery.
MOLINE MALLEABLE IRON WORKS *et al.*

Now come the parties, by their solicitors, and the defendants' motion to dismiss the bill for want of an order setting plea down for

argument coming on to be heard the complainants' solicitor moves to have said plea set down for argument, and after hearing the arguments of counsel the court overrules said motion to dismiss and orders that said plea be set for argument on Monday morning next.

Afterwards, to wit, on the nineteenth day of October, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs.
MOLINE MALLEABLE IRON WORKS *et al.* } In Chancery.

69 Now again come the parties, by their solicitors, and this cause comes on to be heard upon the plea of Stillman W. Wheelock *et al.*, and after hearing the arguments of counsel the court takes the same under advisement.

Afterwards, to wit, on the fourth day of January, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WILLIAM S. MELLEN *et al.*
vs.
MOLINE MALLEABLE IRON WOKKS *et al.* } In Chancery.

And now come the said complainants, by their solicitors, and the said defendants, Wheelock, Carson, Hemenway, J. S. Keator, and Ben. C. Keator, by their solicitors, and the court having considered the plea of said defendants to the said bill of complaint and the arguments of counsel thereon it is ordered that the said plea of the said defendants, Wheelock, Carson, Hemenway, J. S. Keator, and Ben. C. Keator, to the said bill of complaint be, and the same is hereby, sustained.

70 On the same day, to wit, on the fourth day of January, 1886, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause, which said opinion is in the words and figures following, to wit:

Opinion.

WM. S. MELLEN *et al.*
vs.
MOLINE MALLEABLE IRON WORKS *et al.* } In Chancery.

BLODGETT, *J.*:

This is a hearing as to the sufficiency of the plea filed by the defendants, Wheelock, Carson, Hemenway, and J. S. and B. C. Keator.

The bill is filed to enforce the rights reserved to George H. Hill under a trust deed given by the Moline Malleable Iron Works on the 23d of June, 1883, upon its real and personal property for the purpose of securing certain of its creditors, among whom was George H. Hill. The plea sets out the proceedings of this court in a suit brought by the National Furnace Company on the 2d day of July, 1883, against the Moline Malleable Iron Works, George H. Hill, S. W. Wheelock, and others, under which a receiver was appointed for the Malleable Iron Works corporation, and the property covered by the trust deed set out in the complainants' bill in this cause was sold, on the application of the receiver, and the proceeds applied in payment of certain indebtedness of said company, the defendant Wheelock being the purchaser at the receiver's sale. At the time the suit of the National Furnace Company was brought Mr. Hill, one of the beneficiaries mentioned in the trust deed in question in this case, was a resident of the State of Ohio, and before he was served with process or brought in as a defendant to the original suit a receiver was appointed by this court for the Malleable Iron Works and placed in possession of the property of the corporation. Afterwards, and before Mr. Hill was served with process, Wheelock, by leave of court, filed a cross-bill, to which Mr. Hill was made a defendant, alleging in substance that he was one of the
71 the beneficiaries under the trust deed in question, and charging that the trust deed was void and inoperative as to defendant, George H. Hill, but was a valid contract so far as Wheelock was concerned. Afterwards, on the application of the receiver, the property in the hands of the receiver, including that covered by the trust deed, was by order of the court sold for the benefit of all persons who might be found to be interested therein. Before Mr. Hill assigned his interest to the complainant in this suit he was served with an order to appear and plead, answer, or demur to the original bill and cross-bill, pursuant to the provisions of sec. 8 of the act of March 3d, 1875, "To determine the jurisdiction of circuit courts, &c.;" and after the time had elapsed within which by order of this court in the original case the defendant Hill was required to plead, answer, or demur to said bills a final decree was entered in the original case as made by the original bill and cross-bill, by which decree the court found that the trust deed was void as to the defendant, George H. Hill, and that so much of said trust deed as purported to secure the indebtedness of the Moline Malleable Iron Works held by Mr. Hill was inoperative and void. The allegations in the plea show that Mr. Hill was served with process in the cross-bill, to which he was a party, and also that he was duly served with process in the original bill; but it appears that the receiver was appointed and put in possession of the property before service of process on Mr. Hill, and there is no allegation that he ever appeared to either the bill or cross-bill. It is urged that the decree of the court in the suit by the National Furnace Company and the Wheelock cross-bill is not binding on Mr. Hill, because he was not a party to the suit—that is, that he had not yet been served with process when the receiver was appointed and the order made for the sale of the property by the re-

ceiver—but the plea shows that before the order for the sale of the property by the receiver was made Mr. Hill had been served with process under the cross-bill and was in defa-lt for want of a plea or answer, although no record of his default had been entered. It seems to me that the proceedings in the National Furnace Company case and the cross-bill of Wheelock show such full and complete jurisdiction of the subject-matter and the parties as to make all these proceedings binding on Mr. Hill and on complainant, who is a mere volunteer assignee *pendente lite*. The National Furnace Co. bill was filed under the provisions of chap. 32, Rev. Stat. of Ills., in regard to "Corporations for pecuniary profit," and, even if the court erred, its errors cannot be
72 attacked collaterally. By the terms of section 25 of this chapter it is expressly provided that a court of equity may, for good cause shown, take possession of the property of such a corporation and wind up their affairs, and the bill in question was framed with express reference to giving the court jurisdiction for that purpose under the provisions of the statute. This bill does not purport to be a bill for the review and correction of errors made by the court in the National Furnace Company case and lacks the essential features of such a bill. On the contrary, this bill proceeds on the assumption that all that was done in the National Furnace Company case was void as against Mr. Hill and the complainant, as the assignees of his interest in the trust deed, because the National Furnace Company was not a lien creditor and because Mr. Hill had not been served with process under the original bill in that case when the order for the sale of property was made, although he had been duly served under the cross-bill in that case at the time the sale was made. The scope and purpose of that bill was to wind up the affairs of the Moline Malleable Iron Company under the provisions of sec. 25 of chap 32, Rev. Stats., because it had violated certain of the provisions of the statute regulating the management of the business of such corporations and to set aside all alleged preference given by that company to Mr. Hill as one of its officers and a creditor. The cross-bill of Wheelock seems to me to have been in all respects germane to the purposes of the original bill—that is, the purpose of the cross-bill was to assert, as it did, that the trust deed was valid so far as Wheelock was concerned, and alleged invalidity so far as the defendant Hill was concerned, and no decree was entered determining Hill's right until he was properly before the court by due service of process. I may be allowed to say, outside of the plea and, perhaps, outside of what appears in the record, that application was made by Hill after the cross-bill was filed for leave to enter a special appearance and defend, which was denied unless he would enter a full appearance in the case. The plea, under the circumstances, seems to me to be a complete answer to the complainants' bill, and will, therefore, be adjudged to be sufficient.

Endorsed: Filed Jan'y 4, 1886. Wm. H. Bradley, clerk.

73 On the twenty-first day of January, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

WILLIAM S. MELLEN *et al.* *vs.* THE MOLINE MALLEABLE IRON WORKS, STILLMAN W. Wheelock, Amaziah L. Carson, Charles F. Hemenway, Jeremiah S. Keator, Ben. C. Keator, and Stephen T. Walker.	In Chancery.

And now come the said complainants, by their solicitors, and the said defendants, Stillman W. Wheelock, Amaziah L. Carson, Charles F. Hemenway, and Jeremiah S. Keator and Ben. C. Keator, partners, etc., by their solicitors, and the defendants, The Moline Malleable Iron Works and Stephen T. Walker, come not, but therein make default; and thereupon, on motion of complainants' solicitors, the default of said Moline Malleable Iron Works and Stephen T. Walker for want of appearance and plea, demurrer, or answer is taken and entered herein, and it is ordered that the said bill of complaint be taken as confessed by said Moline Malleable Iron Works and Stephen T. Walker; and said cause coming on to be heard upon the bill of complaint and the plea of said defendants, Wheelock,
74 Carson, Hemenway, and Jeremiah S. and Ben. C. Keator, and the same having been argued by counsel, and the court being fully advised in the premises, doth sustain said plea, to which finding the complainants except.

And thereupon it is ordered, adjudged, and decreed that the said bill of complaint be, and the same is hereby, dismissed for want of equity, with costs to the defendants, to be taxed; from which decree complainants pray the allowance of an appeal, which is allowed upon the complainants filing an appeal bond in the sum of two hundred and fifty dollars, with security, to be approved by the clerk, and said bond to be filed within sixty days.

75 Afterwards, to wit, on the eighth day of February, 1886, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, William S. Mellen, of the city of Cincinnati, in the county of Hamilton and State of Ohio, as principal, and Henry H. Graham, of the city of Chicago, county of Cook and State of Illinois, as surety, are held and firmly bound

unto The Moline Malleable Iron Works, Charles F. Hemenway, Amaziah L. Carson, and Jeremiah S. Keator and Ben. C. Keator, late partners as J. S. Keator and Son, their heirs, executors, and administrators, in the penal sum of two hundred and fifty dollars; for the payment of which, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators.

The condition of the above obligation is such that whereas on the twenty-first day of January, A. D. 1886, in a certain cause then pending in the circuit court of the United States for the northern district of Illinois, on the chancery side thereof, wherein said William S. Mellen, trustee to the use of Sophia H. Boyd, and Sophia H. Boyd were complainants and said Moline Malleable Iron Works, Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson, and Jeremiah S. Keator and Ben. C. Keator, partners as J. S. Keator & Son, were defendants, a decree was
76 rendered dismissing the bill of complaint therein and awarding to the said defendants their costs in said suit thereafter to be taxed, from which decree the said complainants have prayed for and been allowed an appeal to the Supreme Court of the United States:

Now, if the said complainants shall prosecute their said appeal with effect and, if they fail to make their appeal good, shall pay all costs rendered and to be rendered against them in case said decree shall be affirmed by said Supreme Court, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the above-bounden William S. Mellen and Henry H. Graham have set their hands and seals this 8th day of February, A. D. 1886.

WM. S. MELLEN. [SEAL.]
HENRY H. GRAHAM. [SEAL.]

Approved by—

WM. H. BRADLEY, *Clerk*,
By E. A. DRUMMOND, *D'p'ty Clerk*.

Endorsed: Filed Feb'y 8, 1886. Wm. H. Bradley, clerk.

77 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein William S. Mellen *et al.* are the complainants and The Moline Malleable Iron Works, Stillman W. Wheelock, Amaziah L. Carson, *et al.* are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this twelfth day of March, 1886.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 531. William S. Mellen, trustee for the use of Sophia H. Boyd, and Sophia H. Boyd, appellants, *vs.* The Moline Malleable Iron Works, Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson, & Jeremiah S. Keator & Ben. C. Keator, late partners as J. S. Keator & Son. Filed April 12, 1886.

FILED
JAN 14 1889
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] *[January, 1889.*

Supreme Court of the United States.

OCTOBER TERM, 1888.

William S. Mellen, Trustee for the use of Sophia H. Boyd, and Sophia H. Boyd,

Appellants,

vs.

The Moline Malleable Iron Works, Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson and Jeremiah S. Keator, and Ben. C. Keator, late partners as J. S. Keator & Son,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS, WILLIAM S. MELLEN, TRUSTEE, AND SOPHIA H. BOYD.

THOS. McDOUGALL,
Of Counsel for Appellants.

Robert Clarke & Co., Printers, Cincinnati.] [*January, 1889.*

Supreme Court of the United States.

OCTOBER TERM, 1888.

William S. Mellen, Trustee for the use of Sophia H. Boyd, and Sophia H. Boyd,

Appellants,

vs.

The Moline Malleable Iron Works, Charles F. Hemenway, Stillman W. Wheelock, Stephen T. Walker, Amaziah L. Carson and Jeremiah S. Keator and Ben. C. Keator, late partners as J. S. Keator & Son,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS, WILLIAM S. MELLEN, TRUSTEE, AND SOPHIA H. BOYD.

STATEMENT OF THE CASE.

On the 5th day of May, 1884, appellants filed their bill in equity in the Circuit Court for the Northern District of Illinois, which, in substance, was as follows:

Appellants, who were residents of the city of Cincinnati, and citizens of the State of Ohio, and appellees were citizens of the State of Illinois, and residents of the Northern District thereof, averred that on the 23d day of June, 1883, the Moline Malleable Iron Works, a corporation created by the laws of the State of Illinois, executed its deeds or mortgages, whereby it conveyed unto one Charles F. Hem-

enway in trust, certain real and personal property, belonging to said corporation, as security among other obligations for the payment of twenty thousand ($20,000) dollars, of its commercial paper, which one George H. Hill, of the city of Cincinnati, State of Ohio, had indorsed for its accommodation and benefit.

They further set forth that said trust deeds, one being given by the corporation on its real property, and the other on its personal property, were duly recorded in the office of the recorder of deeds for the proper county on the 22d day of June, 1883; that said George H. Hill was compelled to pay and did pay said sum of $20,000, in four notes of five thousand ($5,000) dollars each, on which said notes he was accommodation indorser and guarantor for the said The Moline Malleable Iron Works, and of which said notes the said Iron Works was maker; that the Moline Malleable Iron Works had defaulted in the payment of said notes, and that the conditions of said trust deeds or mortgages were broken, and the same had become absolute, and the owners and holders of said $20,000 were entitled to the foreclosure of said mortgages and the sale of said property to satisfy the said debt.

They further set forth that for a good consideration the said Hill, on the 12th day of April, 1884, did sell and convey his entire interest and right and title to said trust deeds or mortgages, and indebtedness secured by the same, to the appellants, who are now and have ever since said 12th day of April, 1884, been the owners and holders of the same; and that there was due and unpaid to them on said indebtedness the sum of $20,000, with interest as set forth therein.

They further averred that on the 2d day of July, 1883, the National Furnace Co., a corporation created under the laws of the State of Wisconsin, claiming to be a general and unsecured creditor of the Moline Malleable Iron Works, did file its bill in equity in said Circuit Court for the Northern District of Illinois, which said bill was in substance as follows:

That it, the complainant was a corporation under the

laws of the State of Wisconsin, and it filed its bill against the Moline Malleable Iron Works, Henry H. Hill, Stephen F. Walker, A. L. Carson, Charles F. Hemenway, S. W. Wheelock, and W. J. Entriken, administrator, all citizens and residents of the State of Illinois, and the Northern District thereof; and also against George H. Hill, of Cincinnati, in the State of Ohio, and a citizen of the State of Ohio.

Said furnace company further averred that the Moline Malleable Iron Works was indebted to it in the sum of $22,390.21 on certain promissory notes, which were made to it for iron sold and delivered by it to said iron works. None of said indebtedness being, at the time of the filing of said bill of complaint, then due. The bill states the names of the stockholders, officers and directors of said Moline Malleable Iron Works, among which was named the said George H. Hill as a stockholder, and as a director. It averred that the capital stock of said iron works was $25,000; that the total indebtedness of said iron works at the date of filing said bill was a hundred thousand ($100,000) dollars, all of which was created, it averred, with the knowledge and assent of each and all of the directors and officers; and that under the laws of Illinois, each and all of said directors and officers were liable for so much of said indebtedness as was in excess of said capital stock, said liability being to all of the creditors of said iron works, of whom complainant was one, and for the benefit of all said creditors said bill in equity was filed.

It set forth also, the giving of the trust deeds or mortgages aforesaid, and the terms thereof, and averred, that at the time the same were given, and for some time prior thereto, the said iron works was insolvent and the said trust deeds were null and void as against the general creditors of said iron works, for the following reasons:

First. Because they constitute a partial assignment for the benefit of creditors, by which said corporation seeks to prefer the endorsers therein named in preference to the other creditors of the corporation, which said attempt your orator is advised and believes is fraudulent and unlawful, under the statutes of the State of Illinois.

Second. Because the said assignment does not purport to put the said assignee in possession of said property, and the said assignee has not actually taken possession thereof, and has not given bond to the county court of Rock Island county, as provided by law in the case of assignments for the benefit of creditors, and it is not intended to file such bond or distribute the said assigned property under the provisions of the statutes in such cases made and provided.

Third. That the two assignments constitute a part of the same transaction, and that the chattel mortgage upon the personal property therein described is void, as against the creditors of the said corporation, because the said corporation has been and still is allowed by the said assignee to manage, control, and use the property therein described in the usual and ordinary course of business, to the same extent and in the same manner as the same were used by the said corporation before the execution of the said chattel mortgage.

Fourth. Because the said documents operate and were designed to operate, to hinder and delay the creditors of the said Moline Malleable Iron Works, in the collection of their debts.

Fifth. Because, as against the fair and honest creditors of the said corporation, the preference sought to be given to the said Hill and the said Carson, two of the directors of the said corporation, is null and void.

Sixth. For divers other reasons your orator has been advised that all of the aforesaid acts and things of the said Moline Malleable Iron Works, as against your orator and the other *bona fide* creditors of said corporation, are null and void.

The bill further alleged that to carry out the alleged fraudulent purposes aforesaid, of devoting said property to the payment of the debts of said directors and other parties that said iron works and its officers threaten that if any of the creditors of said company should institute legal proceedings to collect their debts, than said company would make an assignment of all its property for the benefit of its creditors. And the prayer of the bill was, substantially,

that as complainant was without remedy at common law, that the corporation might be dissolved, its business closed up, and a receiver appointed; and that the trust deed and chattel mortgage might be adjudged fraudulent and void, and the property of the corporation sold and distributed among its creditors.

On the 9th day of July, 1883, the same complainant filed its supplemental bill, averring that after the filing of its original bill, and on the 5th day of July, 1883, one of the promissory notes owned by it, and referred to in the bill of complaint, had become due and payable, and remained wholly unpaid, and that the remainder of said notes, seventeen in number, for various amounts, would mature at various dates between July 20, 1883, and September 23, 1883; and by another supplemental bill, filed July 30, 1883, complainant set forth that after the filing of its bill of complaint, two suits at law had been begun against the iron works by the creditors thereof, in the county court of Rock Island county; and that judgments would be rendered in said actions, and executions be levied thereunder, on the property of said debtors, and praying that said suitors might be restrained.

Appellants, in this case, further averred that said bill of complaint, of the National Furnace Co., did not set forth any specific or existing lien or claim to the property covered by said trust deeds or mortgages; that it did not aver that the indebtedness owing to the furnace company, and sued on, or any part of it, was due; that it did not aver that any writ of attachment, or execution, or other process of law had been issued, whereby any lien on or claim to any of said property had been obtained by said furnace company against the property covered by said trust deeds or mortgages.

Appellants further set forth that the Furnace Company's debt sued on was not in fact due, or any part thereof; and that the said Furnace Company had not obtained any judgment at law on said debt, and had not secured the issuing of any writ of attachment, or other process of law, against the property, and had not exhausted

its legal remedies for the collection of its debt, and had no lien on or claim to said property covered by said deed and chattel mortgage, when said bill of said furnace company was filed; and that, having no such lien or claim to said property, and not having exhausted its legal remedies for the collection of its said claim; that said Circuit Court for the Northern District of Illinois, on its behalf, could not, and had no right to, assume jurisdiction of said cause, and of the said George H. Hill's interest in said property, or of said property, or to compel said Hill at any time to plead, answer, or demur thereto, or to make any order or decree in the premises affecting said property, or the interest of said Hill therein.

The appellants further averred in their bill that, after the filing of said bills by said National Furnace Company, and before the final hearing of said cause, and before any order or process on said bill was made, or served on the said George H. Hill; and while said court had not acquired, and was without, any jurisdiction over the person of said Hill, or his interest in said trust deeds or mortgages, and the property therein described; and, when it had no jurisdiction in the premises, did appoint one Robert E. Jenkins as receiver, to take possession and sell all of said property, and bring the proceeds thereof into court, to abide the further order of court: and said Jenkins did there and then enter into, and take possession of, all said property, as such receiver, covered by said trust deeds or mortgages, and on the 22d day of February, 1884, before any hearing or trial of said cause on its merits, said receiver, acting under the order of said court, and in pursuance thereof, did sell said property to said William W. Wheelock, for the sum of thirty thousand ($30,000) dollars; which sale was, on the 3d day of March, 1884, by said Circuit Court confirmed, and possession of said property taken, under the order of said court, and delivered by said receiver to said Wheelock, and that he, Wheelock, was now in possession of said property, and claimed to be the owner of the same; and that all this was done while said cause had not yet been heard on its merits, while the same

was still pending in the Circuit Court, and when no action had been taken by said court, setting aside said trust deeds or mortgages, and when said court had no jurisdiction over the person of said George H. Hill, and his interest in said property.

Appellants further said that, after the sale of said property as aforesaid, the said Circuit Court, without any authority of law, and for the first time, made an order on the said George H. Hill, as a non-resident defendant (which fact appeared by the bill of complaint of the National Furnace Company aforesaid), purporting to be under section 738 of the Revised Statutes of the United States, to appear and plead to the original and supplemental bill, on or before April 15, 1884, and to be defaulted unless he did so appear and plead.

They further averred that said Hill did not appear, and has never entered his appearance in said cause, and has never consented to said court's taking jurisdiction of said cause, or of his interest in said property; and has been, since the filing of said bill by said National Furnace Company, and is now, a resident and citizen of the State of Ohio, and has not been in said district of Illinois since the filing of said bill.

Appellants further set forth in said bill that on the 15th day of April, 1884, appellant, William S. Mellen, as trustee, as aforesaid, by and with the consent and approval of his co-appellant, Sophia H. Boyd, as the owners of the entire interest of said George H. Hill in and to said trust deeds or mortgages and said indebtedness secured thereby as aforesaid, appeared before said Circuit Court, and moved the court for leave to appear in said cause, and be made a party thereto, and be given leave to protect his rights in the premises; which motion the court overruled, and refused appellant leave to appear in said cause, or to be a party thereto, or to take any action therein to protect his right in the premises.

They further averred that said order of said court, selling said property, was null and void; that, at the time the same was made, the court had not acquired jurisdiction of

the said property, nor of the person of said Hill, nor of his interest in the property so sold; that said court did not acquire by said cause jurisdiction to inquire into the validity of said trust deeds or mortgages, and did not acquire, and had not acquired, jurisdiction over the person of said Hill, nor of the property covered by, and embraced in, said deeds or mortgages. And that all of its orders in the premises, affecting said property, and the said Hill and his interest in said property, and the interest of appellants thereunder, were null and void.

They further averred that said Charles F. Hemenway, as trustee under said trust deeds or mortgages, had wholly failed and refused to protect the interest of said Hill, and appellants, in and to said property, and had sanctioned the illegal sales as aforesaid, made in violation of his duties as trustee, and without taking any steps, or doing any thing toward the protection of the interest represented by said Hill, and the appellants, in and to said property; and had conspired with the other parties to the bill to injure the rights of the appellants as aforesaid.

They made parties to said bill of camplatnt, said Stillman W. Wheelock, Amaziah L. Carson, the firm of J. S. Keator & Son, and Stephen W. Walker, the Moline Malleable Iron Works, and Charles F. Hemenway.

And they prayed that said trust deeds or mortgages might be foreclosed, the liens thereunder, and claims to said property might be ascertained and determined; that their amounts and priorities be fixed; that said property might be sold, and the proceeds of sale distributed as the court may find said parties entitled thereto; that an account of rents, issues and profits, might be taken, a receiver appointed to take possession of the property pending the determination of the cause, and for such other relief as in equity they might be entitled.

The foregoing was the substance of the bill of complaint in this cause. Due process of law was served on the Moline Malleable Iron Works, Charles F. Hemenway, William W. Wheelock, A. L. Carson, J. S. Keator, B. C. Keator, and others. Appearance was entered by Osborn

& Lynde, solicitors for William W. Wheelock, A. L. Carson, Charles F. Hemenway, and the firm of J. S. Keator & Son.

On the 7th day of July, 1885, exceptions for impertinence to said bill were filed, which, in substance, asked to have eliminated from said bill the recitals therein regarding the suit brought by the National Furnace Company, and all of the steps taken by the court thereunder. These exceptions were found by the master not to have been well taken, and were overruled, and by the Circuit Court the master's report was confirmed.

On the 11th day of June, 1885, the defendants, Wheelock, Carson, Hemenway, and Keator. filed their plea to said bill, which is to be found on pages 24, 25, 26, 27, and 28 of said record.

The plea set forth that prior to the time when said George H. Hill had sold and conveyed to the appellants his interest in the trust deeds or mortgages, to wit, on the 2d day of July, 1883, the said National Furnace Company, on its own behalf, and on behalf of all of the creditors of the Moline Malleable Iron Works, filed its original bill of complaint in said Circuit Court, and made parties defendant thereto the parties heretofore set forth in appellants' bill of complaint; that the National Furnace Co. was a creditor of the said Moline Malleable Iron Works at the time when said iron works executed said trust deeds or mortgages, that it was insolvent at that time; that its indebtedness was largely in excess of its capital stock; that its officers and directors had assented to said indebtedness; that the conveyances were fraudulent, and void as against said creditors of said iron works, and they therefore prayed, among other things, that a receiver might be appointed to take charge of and manage the property of the corporation under the orders of the court, and that the trust deeds or mortgages might be held and adjudged fraudulent and void; that after exhibiting said bill of complaint, to wit, on the 1st day of August, 1883, upon the application of the National Furnace Company for the preservation of the property of said corporation pending the suit, etc., the

court appointed one Jenkins, receiver; and that said receiver entered into and took possession of the property under orders of the court.

That, on the 28th day of November, 1883, the defendant, Stillman W. Wheelock, by leave of the Circuit Court, filed his cross-bill of plaintiff in said cause, and made party defendant thereto, among others, the said George H. Hill, and stated that in the year 1880 the said Moline Iron Works requested the said Wheelock and said Carson should become guarantors for it upon its commercial paper, and promised to give them security from any liability or loss by reason thereof, by liens on its property; and that, at its request, and in reliance upon this promise, they became guarantors, from time to time, to the amount of about $50,000; but afterward, on the 12th day of November, 1882, a resolution was adopted by said corporation, authorizing its officers to execute proper instruments to secure them from loss; and thereafter, at the request of said Wheelock, said corporation executed said trust deeds or mortgages; that neither Wheelock nor Carson were in any way interested in or connected with said company when they incurred said liability at its request; that after the resolution of November 12, 1882, was adopted by said company, said George H. Hill, who was a stockholder and director, became a guarantor for said company, and that by and through his influence as an officer of said company, he was named a beneficiary under said deeds or mortgages; that the said company was then largely indebted in excess of its capital stock, and that the said George H. Hill had assented to said indebtedness, and was liable to its creditors for this excess; and that said trust deeds or mortgages were a valid security to said Carson and the said J. S. Keator Lumber Company; but that said Hill was not entitled to have and receive security thereon; that the said property covered by said trust deeds or mortgages was rapidly depreciating in value, and should be sold as soon as possible; and prayed, among other things, that the said trust deeds or mortgages might be declared valid; that the said receiver might be directed to sell immediately the property described in said

trust deeds or mortgages, and the proceeds of the property described in said trust deeds or mortgages might be applied in satisfaction of and to relieve said Wheelock, Carson, and the lumber company from the liabilities assumed by them as indorsers for said iron works, and the balance disbursed pro rata among the creditors of said company; and that, on the 28th day of November, it was ordered by the Circuit Court, as it appears of record, that said National Furnace Co., the said George H. Hill, and others, plead, answer, or demur to said cross-bill, on or before the 20th day of December, 1883; that a copy of said order be served on said Hill on or before December 5, 1883; and that in case said Hill did not appear, and plead, answer, or demur to said cross-bill, as aforesaid, the same should be taken as confessed by him; that said order was duly served on said Hill on the 1st day of December, 1883, to wit, long prior to the making of the assignment to appellant, Wheelock; that the said defendants, the furnace company, Hemenway, and Carson, answered said cross-bill; but that said Hill and said iron works failed to do so; that thereafter, on the 22d day of December, 1883, the said receiver filed his petition in said cause, and alleging, among other things, that the property in his possession, of said iron works, was rapidly depreciating in value, and that for the interests of all persons who might be interested therein, it should be sold at once, praying that he might be authorized to sell the same; and thereupon it was ordered, on the petition of said receiver, by the Circuit Court, that the receiver should offer and advertise for sale all of said property, and should report bids therefor to the court; on the 20th day of February, 1884, the receiver filed his report, and that the highest bid received by him for said property was that of Stillman W. Wheelock, in the amount of $30,000; that, on the 28th day of February, 1884, the said bid of Wheelock was accepted; and, on the 3d day of March, said receiver was ordered to convey all of said property to said Wheelock in accordance with said order; that thereafter, on the 3d day of March, 1884, it appearing to said Circuit Court that George H. Hill resided beyond the juris-

diction of the court, it was ordered by the court that said Hill do appear, plead, answer, or demur to the original or supplemental bill of complaint in said cause on or before the 15th day of April, 1884; that a copy of said order should be served on said Hill on or before the said 15th day of March, 1884; and that in case he did not appear, plead, answer, or demur to said bill, as directed by the order, the same should be taken as confessed by him; that a copy of said order was served on said Hill; and that, on the 22d day of April, 1884, said Hill not appearing and pleading, etc., it was ordered by the court that the original and supplemental bill be taken as confessed by said Hill; that on the 23d day of April, 1884, prior to the filing of the bill by appellants, the court found that Hill had not appeared and pleaded to the cross-bill of Wheelock, and that the same be taken as confessed by said Hill; that on the 20th day of June, 1884, the said cause came on to be heard on the original and supplemental bill of complaint, and answers and replications thereto, and on the cross-bills of Wheelock, and the answers and replications thereto, and upon the testimony taken in said cause, and final decree was then rendered therein, which now appears of record in the court; and it was therein found by the court, among other things, that the indebtedness of the iron works was in excess of its capital stock in the sum of $75,000; that the trust deeds or mortgages were valid, in so far that they gave to said Wheelock, Carson, and the lumber company a first lien on the property therein described; that the said George H. Hill was not entitled to any lien or security by reason of said trust deeds or mortgages, and that the same were invalid as to him, because the liabilities in excess of its capital stock were incurred while he was one of its directors and its president, with his knowledge and consent, and because he was named in said trust deed and chattel mortgage as a beneficiary thereunder, through his influence and control over said corporation as an officer thereof; and it was thereby decreed, among other things, that said Wheelock, Carson, and the lumber company were entitled to have and receive the proceeds derived from the sale of said prop-

erty conveyed by said trust deeds or mortgages in part satisfaction of the sums paid by them for said company. All of which matters and things set forth in said plea, as aforesaid, were by the defendants averred, and plead in bar to said bill of complaint, and judgment was asked accordingly.

The case was heard on the complaint and plea, and the plea was by the court, on the 4th day of January, 1886, sustained, and the bill dismissed; and on the same day the opinion of Judge Blodgett, sustaining the plea, and dismissing the bill, as appears on pp. 29, 30, and 31 of the record, was filed in said Circuit Court. By the opinion, it will appear that the court held that the bill of the National Furnace Company was filed to wind up the affairs of the iron works, under the provisions of section 25, chapter 32, Revised Statues of Illinois, because it had violated certain of the provisions of the statute regulating the management of the business of such corporation; and to set aside the alleged preference given by that company to Mr. Hill as one of its officers and creditors; and that the cross-bill of Wheelock was in all respects germane to the original bill, and that, by the original bill of the National Furnace Company, the Circuit Court had acquired jurisdiction of George H. Hill to the extent of his interest in and to said property; and that the plea, under the circumstances, was a complete answer to complainant's bill.

The foregoing is, in substance, a statement of the case now pending in this court on appeal, and the judgment in which appellants ask to have reversed, for the following reasons:

ARGUMENT.

I.

"Did the Circuit Court acquire jurisdiction of George H. Hill, or of his interest in said property, in the case brought by the National Furnace Company, and referred to in the plea?"

Section 739 of the Revised Statutes of the United States provides that:

"No civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ."

It is admitted that George H. Hill, at the time of the bringing of the suit by the National Furnace Company, was a resident and citizen of the State of Ohio, and that fact appears by the bill.

It is also admitted that he did not voluntarily appear in said cause, nor was he served by process in said district or circuit; therefore, the Circuit Court could not have acquired jurisdiction over George H. Hill, or his interest in the property, save and except by service of process in a proper case in the district in which he resided, or by his voluntary appearance in said Circuit Court.

Herndon v. *Ridgeway*, 17 How. 424.

In section 738 of the Revised Statutes of the United States it is provided:

"That when, in any suit, commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance, or lien, or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order, directing such absent defendant or defendants to

appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be: or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published, in such manner as the court may direct, not less than once a week for six consecutive weeks: and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, . . . it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district: but such adjudication shall, as regards such absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

This section provides for process on defendants residing in other districts in a certain class of cases, and is limited to that class, and necessarily excludes every other class. The question is, was the case brought by the National Furnace Company one of the class of cases covered by section 738? If it was not, then the attempt to serve process on Mr. Hill, in that case, and to acquire jurisdiction therein of his interest in the property covered by the trust deeds, was void, and the plea ought not to have been sustained.

The bill in this case which, for the purposes of the plea, is taken as admitted to be true, shows that the National Furnace Company had neither a legal nor an equitable lien upon, or claim to the property covered by the trust deeds. It shows that the Furnace Company was only a general unsecured creditor of the Moline Malleable Iron Works, and that its debt as such creditor was not due at the time it filed its bill of complaint in the Circuit Court. Its claim against the Iron Works had not been reduced to judgment, nor had it exhausted the property of the Iron Works, its debtor, by execution or other legal

process, nor had any attachment or other process been issued by the Circuit Court or any other court, whereby any lien on or claim to the property covered by the trust deeds had been acquired. A reading of the bill of the National Furnace Company in the light of repeated decisions of this court, and other courts, will be sufficient to satisfy the court without further argument that the case attempted to be presented by the National Furnace Company, was not a case covered by section 738, and that as attempting to enforce any lien on or claim to the property covered by the trust deeds, it could not have been sustained.

Jones v. *Green*, 1 Wallace, 330.

The syllabus of that case states the law to be as follows:

"A bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor held by a third party, upon a secret trust for him, to the satisfaction of their judgment, until a fruitless attempt has been made for its collection by execution at law."

In *Van Weel* v. *Winston*, 115 U. S. 228, Justice Miller, in delivering the opinion of the court, on page 245, said:

"That as a creditor of the company, Mr. Van Weel had no right to interfere in the matter until he had a judgment against the company with an execution returned *nulla bona*."

In the case attempted to be made by the National Furnace Company, by their bill filed in the Circuit Court, it was alleged that the trust deeds or mortgages were invalid; that the mortgages had been unlawfully preferred, and that the property had been placed thereby beyond the reach of the general creditors, including the complainant.

In *Jones* v. *Green*, *supra*, these were exactly the allegations contained in the bill, and yet this court decided that even although the creditors seeking to assail the conveyances had reduced their claims to judgment, that did not give them a lien on the property, to entitle them in a

court of equity to assail the conveyance made in fraud of the creditors.

The court said:

"In this case the bill alleges that executions were issued upon the judgments of the complainants and were returned unsatisfied; but the allegation was not admitted and no proof on the subject was produced at the hearing. The case, therefore, stands as a suit in equity commenced for the satisfaction of judgments before any attempt had been made for their collection at law by the issuing of execution thereon. That the suit can not be maintained under these circumstances is clear, both upon principle and authority."

In the *Freedman's Savings and Trust Company* v. *Earl*, 110 U. S., page 710, this court discusses at length, when it is that a creditor obtains a lien on, or claim to the property, that gives him a standing in a court of equity to assail the conveyances, such as was sought to be assailed by the National Furnace Company in its complaint.

Pages 715 et seq., are cited for a very full discussion of this doctrine, and would seem to us to settle beyond any controversy, the fact that the case presented by the National Furnace Company in its bill, was not a case covered by section 738, and not being such a case, the Circuit Court did not acquire jurisdiction of the interest of Hill in the property, seeing that Hill was an inhabitant of another district, and had not voluntarily appeared in the cause.

Section 738, and its application to certain causes has been interpreted in a well considered case.

Schainwald v. *Lewis*, 5 Fed. Rep. 510.

Sections 738 and 739 have also been considered in the cases of *The Pacific Railroad Company* v. *The Missouri Pacific Railroad Company*, 3 Fed. Rep. 772, and *Lovejoy* v. *Hartford Fire Insurance Company*, 11 Fed. Rep. 64.

It is claimed, however, by the Circuit Court, in its opinion dismissing the bill in this case (Record, page 31), that the bill of the National Furnace Company was one to

wind up the affairs of the Moline Malleable Iron Works, under the provisions of section 25, chapter 32, Revised Statutes, because the court said that the iron works had violated certain of the provisions of the statutes; regulating the management of the business of such corporations, without specifying any such violations, and to set aside an alleged preference given by that company to Mr. Hill as one of its officers and creditors; and it will be noticed that the Circuit Court, so far as appears by the record, did not on final decree dissolve the corporation or find complainant entitled to such relief.

Could the bill of the National Furnace Company have been sustained, as claimed by the Circuit Court, as a bill to dissolve the corporation, under section 25, chapter 32, of the Revised Statutes of Illinois? That section and chapter will be found in Volume 1, page 618, of Starr & Curtiss', edition of the Revised Statutes of Illinois, and the section is as follows:

"25. Dissolution by decree—suits in equity against stockholders—winding up corporation—receiver. 25. If any corporation, or its authorized agents, shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money after demand made by the officer, to be returned 'no property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his pro rata share of such debts of liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation (giving the name), to

sue in all courts, and do all things necessary to closing up its affairs, as commanded by the decree of such court. Said receiver shall be in all cases a resident of the State of Illinois, and shall be required to enter into bonds payable to the people of the State of Illinois, for the use of the parties interested, in such penalty and with such securities as the court may, in the decree or order appointing the same, require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him or it, from the county where the cause of action accrued, to the sheriff of any county in this state for service."

We fail to see, on a reading of this section of the statute of Illinois, how the bill of the National Furnace Company gave it a right to invoke the aid of a court of equity, and seek for a dissolution of that company.

The National Furnace Company was a creditor of a corporation, which was carying on, and which was engaged in active business when the bill was filed. At the time the bill was filed, the liabilities of the iron works to the furnace company had not matured, and were not due. The only averment in the bill touching any pretended abuse of the corporate powers of the iron works, was the creation of indebtedness in excess of the amount of its capital stock. It did not aver that it was in excess of its ability to pay the indebtedness, at the time the indebtedness was created. The bill of the furnace company further set forth the giving of certain trust deeds or mortgages, to secure certain indebtedness, which it was averred were fraudulent, and void for certain reasons therein set forth. The trust deeds were given to secure *bona fide* debts; and in the case of George H. Hill were not given to secure a pre-existing debt, but were given to secure him for money which he thereafter obligated himself to pay on behalf of the company on the company's default, and which he in fact did pay.

The bill also averred that the company was insolvent—although at the time of the filing of the bill it had not committed any act of insolvency—neither was any act of insolvency recited in the bill. We submit that the bill

filed on behalf of the furnace company, did not on its face entitle it to a decree, dissolving the corporation, under section 25, chapter 32, of the Revised Statutes of Illinois.

The case of *Hyde Park Gas Co.* v. *Henry Kerber*, 5 Bradwell, Ill. App. 132, is an instructive case, touching the application of section 25, and when a court of equity will decree the dissolution of a corporation, and that the case presented by the bill of the National Furnace Co., was not such a case.

In *Wernock* v. *Turpin*, 96 Ill. 135, the Supreme Court of Illinois held that section 25, chapter 32, being the section referred to, applies only to corporations organized under that act, and to no others.

The bill of the National Furnace Company does not set forth that the Moline Mallable Iron Works was a company created under the Act of July 1, 1872, and was a corporation subject to the provisions of section 25, chapter 32.

Even if a case had been presented by the bill of the National Furnace Company, calling for a dissolution of the Moline Malleable Iron Works, which we say is not so presented, the averment that it was a corporation created under the Act of July 1, 1872, and was bound by the provisions of section 25, would have been absolutely necessary, and its absence would have made the bill liable to demurrer.

It requires a very strong case of abuse of corporate powers, to warrant a court of equity to seize the property of a going corporation, engaged in active business, sell it and dissolve the company. We know of no case where this was done on the complaint of a general unsecured creditor of the company, whose debt was not even due.

It will be noticed by section 25, that the acts necessary to authorize a court of equity to exercise such extraordinary remedies, are such as would subject the corporation to a forfeiture of its charter or corporate powers; for it is not pretended that this company had allowed any execution or decree of any court of record for a payment of

money, after demand made by the officer, to be returned, "No property found," or to remain unsatisfied.

We submit, therefore, that the bill filed by the National Furnace Company, was not such a bill on its face as entitled it to a dissolution of the Moline Malleable Iron Works, under section 25, chapter 32, of the Revised Statutes of Illinois, and can not be sustained as such.

Supposing, however, for the purposes of the argument, that it was such a bill, is such a suit one contemplated by section 738 of the Revised Statutes of the United States? We submit that it is not.

An unsecured creditor bringing such a suit, whose claim is not in judgment, has no claim to and can have no lien on any part of the real or personal property of the corporation, such as is contemplated by section 738. In the event that the corporation is not dissolved, and a creditor is not entitled to a decree to wind it up, his bill necessarily must be dismissed. No receiver could be appointed who would have the right to sell the property until such action was taken by the court, and it does not appear by the record in this case that the Moline Malleable Iron Works ever was dissolved, or that the court found that the National Furnace Company was entitled to have the corporation dissolved and the relief granted as provided by section 25, chapter 32, of the Revised Statutes of Illinois.

II.

"*Had the Circuit Court the authority to make the order of sale that it made in the case brought by the National Furnace Company?*"

The Circuit Court appointed a receiver to take possession of the property covered by the trust deeds or mortgages, and ordered the property sold covered by said trust deeds, before it had even attempted to acquire jurisdiction of the interest of George H. Hill.

As appears by the record, the receiver was appointed on the 1st day of August, 1883, upon the application of

the National Furnace Company; and on the 22d day of December, 1883, the receiver was authorized to offer said property for sale, and to report bids therefor to the court; and on the 20th day of February, 1884, the receiver filed in the case his report that he had advertised and offered the property for sale, and that the bid of Stillman W. Wheelock, of $30,000, was the highest and best bid for the same; and on the 3d day of March, 1884, said bid was accepted and the receiver ordered by the court to sell and convey the property to said Wheelock, which was accordingly done; prior to that time no action of any kind had been taken to bring George H. Hill before the court on the complaint of the National Furnace Company, and no order had been made on him to plead, answer or demur to said original and supplemental bill.

On the 3d day of March, 1884, after the property had thus been sold to Wheelock by the receiver, the said Hill was ordered by the court to appear and plead, answer or demur to the said original and supplemental bill of complaint, on or before the 15th day of April, 1884. These dates, which appear by the record, and which are not disputed, show that when the receiver was appointed to take possession of the property, and the property was sold and transferred to Wheelock, no attempt had been made to bring George H. Hill before the court on the original or supplemental bill, or to afford him an opportunity to protect his interest in and to the property thus sold to Wheelock.

The bill of the National Furnace Company showed and advised the court at the time it was making these orders, and confirming said sale, that George H. Hill was a citizen of the State of Ohio, and a resident thereof. It certainly seems clear on authority, that any order made by the court affecting the interest of Hill, before jurisdiction had been acquired of said Hill or his interest in the property, must be void.

This question is discussed in the case of *Webster* v. *Reed*, 11 How. 457, where the court, on page 460, say:

"No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice nor attachment, or other proceeding against the land until after the judgments. The judgments, therefore, are nullities and did not authorize the executions on which the land was sold."

In the same case the court say:

"If jurisdiction could be exercised under the act, it was essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice; and negative proof that the notice was not given, under such circumstances, could not be rejected."

This is a very instructive case as to what the court may do in cases where it can only acquire jurisdiction of the interest in the lands by a specific method, and where before any order can be made affecting the interest in the land of any party claiming to own it, or to possess an interest in it, the provisions of the statute conferring jurisdiction must first be complied with. Any judgment or order made before the provisions of the statute are complied with, is void, and can not be made valid by an attempt to comply, or even compliance with the statute, after the order or judgment has been rendered.

The extent of the power of the court to make orders, even where it has acquired jurisdiction, which we claim it did not in this case over the interest of Hill, is well settled in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, where the court say, speaking of the general provision that the court having acquired jurisdiction, has a right to decide every question which arises in the case:

"That is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the questions to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

This doctrine and its application to various cases is well stated in the following cases:

United States v. *Walker*, 109 U. S. 258.
Bigelow v. *Forrest*, 9 Wallace 339.
Ex parte Lange, 18 Wallace, 163.

An examination of these cases will show that the orders attempted to be made in the former case, as to the appointment of a receiver for the property covered by the mortgages and the sale of the said property, and the confirmation of the sale of the said property, could not in any way bind or affect the interest in the property of George H. Hill as mortgagee; and, therefore, so far as that interest is concerned, he or his assignee or assignees are entitled to the foreclosure of said mortgages, and the protection of their interests in said property, the same as if no suit had ever been brought by the National Furnace Company, and no such orders had ever been made.

As has been said, and as appears by the record, the receiver was appointed, the sale was made of the property, and the sale confirmed, in that cause, before any attempt was made to serve George H. Hill with process on the original and supplemental bills, and certainly long before the time when he was compelled to answer or demur to the bill, even if the court had acquired jurisdiction of his interest in the property by reason of said bill.

If our first proposition be correct, that the Circuit Court did not and could not acquire jurisdiction of the interest of George H. Hill in and to this property, because the case presented by the bill of the National Furnace Company was not one covered by section 738 of the Revised Statutes of the United States, all the orders made by the court, as against said Hill and his interest in the property, are necessarily void.

Even if we are wrong in that proposition, nevertheless the action of the Circuit Court, in ordering this property sold, and confirming the sale, under the bill of the National Furnace Company, before it had even attempted to acquire jurisdiction of said Hill, or his interest in the property, by the necessary proceedings or orders required by section 738,

was void, because said order to sell and the confirmation of said sale were made long before the court had even attempted to acquire jurisdiction of the interest of said Hill in and to said property; and the court could not subsequently, as against said Hill, who did not voluntarily appear in said cause, make valid its action by any thing it might do thereafter.

III.

"*If the Circuit Court did not acquire, and could not acquire, jurisdiction of George H. Hill, or his interest in said property, by the original and supplemental bills of the National Furnace Company, did the cross-bill of Wheelock and others enlarge the jurisdiction of the court in the cause, and give the court jurisdiction over the interest of said Hill in said property, and over said Hill, which jurisdiction it could not and did not acquire by the original and supplemental bills?*"

It will be noted here that the property was sold, and the sale confirmed, long before any decree had been entered or taken, either on the original bill or cross-bill, affecting the interest of Hill in the property, and long before any decree was taken on the merits of the cause presented by the bill or cross-bill.

The decree of the court on the merits was entered on the 26th of July, 1884. On the 23d of April, 1884, the court found that said Hill had not appeared, pleaded, answered, or demurred to the cross-bill, and it was, therefore, taken as confessed by said Hill; and on the 22d of April, 1884, the same decree, *pro confesso* as to the original bill, was entered against Hill. The order to said Hill to plead as to the cross-bill was made on the 28th day of November, 1883, and the time in which to plead, answer, or demur to said bill was fixed for the 20th of December, 1883, and Hill was served with a copy of said order in Ohio on the first day of December, 1883, but no decree was taken, either on the merits of the bill, or *pro confesso* on the cross or original bills against Hill, until the dates heretofore stated.

Assuming, then, that the Circuit Court did not acquire

jurisdiction over said Hill, or his interest in the property covered by the trust deeds, by the original and supplemental bills, did it acquire jurisdiction, or have its jurisdiction enlarged, by any cross-bill filed in that case?

It is well settled that a cross-bill is a mere auxiliary suit, and must touch matters in question on the original bill.

Cross v. *De Valle*, 1 Wallace, 1.

It is also settled that matter can not be litigated between the defendants, by way of cross-bill, which is foreign to the original bill.

Putnam v. *New Albany*, 4 Biss. 365.

Nor can a cross-bill be used for settling any controversy between defendants.

Weaver v. *Alter*, 3 Woods 152.

Neither can new parties be brought into a case by the cross-bill.

Shields v. *Barrow*, 17 Howard 130.

This proposition would seem to settle conclusively our third proposition, namely, that the Circuit Court did not acquire jurisdiction over Hill's interst in the property by the cross-bill, if it had not acquired it under the original and supplemental bills; for if Hill or his interest in the property could not be made a party to the original bill, and he and such interest were essential parties to the cross bill, then he was a new party, and a new controversy was created which was not germane to the original bill.

It is clear that even as against the other mortgagees under the trust deeds, the National Furnace Company presented no case for relief, for it was merely an unsecured creditor, whose debt was not due, and it had no lien on or claim to the property in question, as we have already stated.

In *Ayres* v. *Carver*, 17 Howard 591, the court says:

"The cross-bill is auxiliary to the proceeding in the original suit and a dependency upon it."

In *Shields* v. *Barrow*, *supra*, the office of a cross-bill is fully discussed, and the court is referred to that case in connection with the cases already cited to show that if no case was presented by the original bill which would justify

the Circuit Court in seizing jurisdiction of the interest of Mr. Hill in the mortgaged property, the jurisdiction of the court could not be enlarged by the cross-bill, and Hill's interest in the property could not be affected by any order or decree made on that cross-bill.

As we have stated, it was attempted to acquire jurisdiction of Hill and his interest in the property on the cross-bill, long before any attempt had been made to acquire jurisdiction of him and his interest on the original and supplemental bills. The order on the cross-bill was served on Hill in Ohio on the 1st day of December, 1883, ordering him to plead, answer, or demur to said cross-bill on or before the 20th day of December, 1883. It was not until the 3d day of March, 1884, that the court ordered Hill to appear, plead, answer, or demur to the original and supplemental bills, which was to be done by him on or before the 15th day of April, 1884, and during these dates the entire property covered by the trust deeds which had been taken possession of by the receiver, had been, by the court ordered to be sold, and the sale had been confirmed, and the purchaser put in posssession of the property.

IV.

"*Are the complainants entitled to the relief sought by their bill which was dismissed by the Circuit Court, and from which dismissal, appeal was taken to this court?*"

The order made by the court on George H. Hill to appear and plead to the original and supplemental bills, was made on the 3d day of March, 1884, and the time fixed was on or before the 15th day of April, 1884. The bill in this case shows that, prior to said 15th day of April, 1884, Hill, on the 12th day of April, 1884, for a good consideration, sold and transferred his entire interest in said trust deeds, and indebtedness thereby secured, to the appellants herein, a conveyance being made to William S. Mellen as trustee for his co-appellant, Sophia H. Boyd; and that on the 15th day of April, being the date fixed for said Hill to plead, answer, or demur to said original and supplemental bills,

and before any decree had been entered, either on the merits of the original bill, or *pro confesso* on the cross-bill, the said Mellen, appellant, appeared before said Circuit Court, and petitioned the court for leave to appear in said cause, and be made a party thereto, and be given leave to protect his interests in the premises, of which interests he advised the court, which motion the court overruled, and refused appellant leave to appear in said case, or to be a party thereto, or take any proceeding therein to protect his rights in the premises; and these averments are not denied by the plea.

We claim that, even if the court had acquired jurisdiction over Hill and his interest in the property, that nevertheless appellant was entitled to be made a party to that proceeding, and have his rights protected, because at that time no decree had been taken on the merits of the bill, and he was interested in the proceeds of the sale and the questions touching the validity of the trust deeds.

If the court did not acquire jurisdiction of Hill's interest in said property by the original and supplemental bills, and the jurisdiction of the court was not enlarged by the cross-bill, certainly the complainants are entitled to the relief sought in the bill herein. That they are so entitled to the relief, seems to us clear, if we are correct in our assumption as to the lack of jurisdiction by the court, in the case brought by the National Furnace Company, over the interest of said Hill in the property covered by the trust deeds.

A very instructive case as to the relief appellants are entitled to, is the case of *The Minnesota Company* v. *The St. Paul Company*, 2 Wallace, 609.

The bill in that case was framed similarly to the one in the case at bar. In that case, property had been sold by the marshal, under a wrong interpretation of an order which the court did in fact make. The court confirmed the sale. Its attention not having been directed specifically to the marshal's mistake, or any issue raised as to what the court really meant, the Supreme Court held that a bill in the case was proper; that its recitals were necessary, and granted the relief sought, and that without determining

whether the bill filed was a supplemental bill in the former case, or an original bill — whether it was independent, or only ancillary to the former suit. It held that an unjust advantage had been obtained by one party over another, by a perversion and abuse of the orders of the court, and the party injured, coming now to the same court, to have this abuse corrected, and carry into effect the real intention and decree of the court, was entitled to the relief sought.

It is certainly well settled that where the property, or interest in the property, has been sold under the order of the court, which order of the court was void, because the court had not acquired jurisdiction of the party or the interest in the property; that the proper proceeding for the party thus injured to assert his rights, is by a bill filed in the court to set aside the cloud thus attempted to be cast on his interest in the property, and to bring all the parties before the court, in order that full and final relief may be granted, as has been done in this case. A full discussion of this principle is found in the case of the *Pacific R. R. of Mo.* v. *The Mo. Pa. R. R. Co.*, 111 U. S. 505, where the court say :

"Upon the question of jurisdiction there can be no doubt that the Circuit Court, as the court which made the Ketchum decree, and had jurisdiction of the Ketchum suit, as this court in *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, held it had, has jurisdiction to entertain the present suit, to set aside that decree on the grounds alleged in the bill, if they shall be established as facts, and if there shall be no valid defense to the suit."

It seems to us clear that the Circuit Court in the former case did not acquire jurisdiction of the interest of George H. Hill in the property covered by the trust deeds; that Hill's interest as mortgagee was not affected, and could not be affected, by any order made in that case, whatever may be the effect of the orders made in that case upon the parties who entered appearance, or who resided within the district, and were served with process.

It further appears clear that the Circuit Court should

not have refused the right of appellants to proceed and assert their rights in the original case, which they sought to do on the 15th of April, 1884, before any decree had been entered by the court on its merits, or any action had been taken by the court determining the extent and the character of the interest of said Hill in and to the property covered by the trust deeds.

On said 15th day of April, 1884, the appellants were, and ever since have been, the owners of the trust deeds or mortgages to the extent that they covered the interest of said Hill, which interest of said Hill was created by his paying $20,000 in money for said iron works, and which trust deeds were given to secure said payment before it was made, and as the condition of its payment, and not to secure a pre-existing debt; and therefore the case was not one which is covered by any rule vitiating a so-called preference in favor of a directer or officer of the company, procured by his influence, to secure a pre-existing debt, when the corporation is insolvent.

Any director or officer of a corporation has a right to insist, whatever may be the condition of the corporation at the time, that before he advances money, or becomes security for the payment of any debts, he shall be secured by mortgage. It is only where an existing debt is sought to be secured, in preference to other existing creditors, when a corporation is insolvent, that the validity of the security, given to an office or director, procured by his influence, can be questioned; but the record in this case shows that at the time the trust deeds were given, Mr. Hill had not then paid any money for or on behalf of the Moline Malleable Iron Works. He insisted, as he had a right to insist, as any director or officer had a right to insist, that before he assumed the obligation of an accommodation indorser for the company, and before he paid the money as such accommodation indorser, he should be secured by trust deeds on the property of the company.

We submit that on the record itself, admitting all the allegations of the plea to be true, that no case of any kind is presented that justified the Circuit Court in ordering the

interest of George H. Hill in the property to be sold, and in setting aside said trust deeds so far as the same secured the valid indebtedness of the Moline Malleable Iron Works, in favor of George H. Hill, created as aforesaid.

The plea of the appellees concedes the truth of the allegations contained in the bill, and simply sets up as a defense, the order made in the cross-bill in the case brought by the National Furnace Company, which was not a case entitling the Circuit Court to take jurisdiction of said Hill or his interest in the property. That order, as we have stated, was made on the cross-bill some time after the appellants applied for leave to the court to be made parties to that cause, and was made by the court when it was without jurisdiction of said Hill or his interest in the property, which leave the Circuit Court refused, and which order or decree on the cross-bill was made long before any decree had been rendered on the original or supplemental bills in the cause. The property was sold and sale confirmed before the Circuit Court issued any order to Hill to plead to the original or supplemental bills. The final decree on the merits was not rendered until some time after this suit was entered in the Circuit Court.

We respectfully submit that the Circuit Court erred in sustaining the plea to the bill, and dismissing said bill, and that said judgment ought to be reversed, and the case remanded to the Circuit Court for such relief in equity as the appellants are entitled to.

THOS. McDOUGALL,
Of Counsel for Appellants.

APR 12 1889

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 250.

WILLIAM S. MELLEN, TRUSTEE FOR THE USE OF SOPHIA H. BOYD, AND SOPHIA H. BOYD, APPELLANTS,

vs.

THE MOLINE MALLEABLE IRON WORKS, CHAS. F. HEMENWAY, STILLMAN W. WHEELOCK, STEPHEN T. WALKER, AMAZIAH L. CARSON, AND JEREMIAH S. KEATOR AND BEN. C. KEATOR, LATE PARTNERS AS J. S. KEATOR & SON, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANTS, WILLIAM S. MELLEN, TRUSTEE, AND SOPHIA H. BOYD.

THOS. MCDOUGALL,
Of Counsel for Appellants.

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Reply to Brief of Counsel for Appellees.

STATEMENT.

In addition to what has heretofore been stated, it will be noted by the plea (Rec., pp. 24–28) that the cross-bill of Wheelock and Carson fails to state any default in the conditions of the mortgages or any grounds which entitled them to any specific or general relief as mortgagees.

The conditions of the mortgages are to be found in Record, pp. 2–4. By these conditions it will appear that Wheelock and Carson and the other mortgagees were only entitled to sale and foreclosure on default of payment by the grantors.

The cross-bill, as appears by the plea and the record, fails to show that at the time it was filed or at the time of the sale of the property, or any other time, the company had defaulted in the payment of the obligations on which they were guarantors; fails to show that the company had not paid them, and fails to show that Wheelock and Carson had been compelled to pay anything or were in any way injured. All that it does show as ground for relief is (Rec., p. 25) that Hill's lien was invalid because he used his influence as director to procure it, and that the property was rapidly depreciating in value. What value it was and whether sufficient or not does not appear. It does not even appear that the debts guaranteed by Wheelock and Carson were even due.

These facts are to be borne in mind in what follows in reply to the brief of counsel for appellees.

ARGUMENT.

I.

"Jurisdiction over Subject-Matter."

Pages 15 to 25 of brief contain a discussion of the jurisdiction acquired by the original bill of the National Furnace Company.

So far as George H. Hill and his interest in the specific property embraced in his mortgages is concerned, that bill could only give the court jurisdiction of the subject-matter provided on its face, it disclosed such a case as is covered by Revised Statutes, section 738. If the bill on its face did not disclose such a case, then, so far as Hill's interest in the property and the mortgages was concerned, the circuit court

did not and could not acquire jurisdiction of the subject-matter.

This seems to be conceded by counsel for appellees, for on page 26 of their brief they say:

"The provisions of this statute were complied with in the service of this order on Hill, *and if the case presented by the Furnace Company's bill came within the scope of the statute,*" &c.

Did the case presented by the Furnace Company's bill come within the scope of the statute? If it did not, it is conceded, so far as this branch of the argument is concerned, that the circuit court did not acquire jurisdiction over the subject-matter, to wit, Hill's interest in the mortgages and the property they covered, and therefore its decrees in the premises were void, and the decree in this case dismissing the bill ought to be reversed.

In order to determine whether the case presented by the Furnace Company's bill came within the scope of the statute, section 738, let us follow the brief of counsel for appellees and see how they define their omnibus bill—a bill drawn evidently to catch something, if there was anything to catch.

On page 27 of their brief counsel say this bill was not a creditor's bill. This is a frank confession; we did not think it was. The Furnace Company was an unsecured general creditor, "*whose debt at the time of filing its bill was not even due.*" It had no lien on or claim to the property mortgaged that was either legal or equitable.

On the same page counsel tell us what the bill is: "*A bill for the administration and distribution of property that formed a trust fund.*"

Following this statement and as the reason for making it, counsel say:

"There can be no question but that upon the insolvency of a corporation or its dissolution its property becomes a trust fund for its creditors primarily, and after

satisfaction of their claims, for its stockholders. Any creditor can maintain a bill for the administration of this trust and the distribution of this fund. A bill of this character is a bill to enforce the primary lien and claim of the creditors upon this trust fund, and conforms to the first class of suits described in the statute."

No authorities are cited to sustain this captivating, enchanting, indefinite claim of the trust character of corporate assets.

It will be noted here this corporation was an existing, active, going concern; so we are not called on to discuss this trust theory as applied to corporations which are dead—dissolved.

This trust theory is best answered by the language of the court in Arthur *vs.* Commercial Railroad Bank of Vicksburg, 9 S. & M., 395, in which that court held that the assets of an insolvent corporation were no more a trust fund than the assets of an insolvent individual, and said:

"It is now settled that a bank may make an assignment of its effects for the payment of its debts. Such assignments, whether made voluntarily or by operation of law, have often been upheld. * * * The objection on this part of the case, however, is that the assets of a bank constitute a trust fund for the payment of all its debts, and that no disposition can be made of this trust fund, but only that which secures equality among the creditors; in other words, that no priorities or preferences can be given.

"In one sense, the assets of a bank do constitute a trust fund, for they cannot be lawfully diverted from the payment of debts; yet no creditor, unless he have a judgment, has such an interest in them, apart from an assignment, as will enable him to subject them to his debt. A particular assignment may be made of part of the effects to pay a specified debt. Payment may be made to a single creditor, though such payment may exhaust the fund. These preferences could not be given if any indefinite trust attached to the assets in favor of all the creditors. A preference given by a general assignment does not, therefore, of necessity invalidate the deed, yet all such preferences are liable

to objection and must be watched with jealousy. Though they may create suspicion they are not in themselves fraudulent."

It is certainly an extraordinary proposition that section 738 covers every case which could be brought by a creditor of an insolvent corporation, and that a general, unsecured creditor of an insolvent corporation which was carrying on its business, whose debt was not due, had such a lien on or claim to the assets of the corporation as to entitle him to file a bill to have any specific lien adjudged fraudulent.

Suppose that Hill's was the only mortgage, could the Furnace Company maintain a bill before its debt was due, having no lien on the property, to set aside his mortgage on this theory of an insolvent corporation's assets being trust funds? Further argument on this point seems to us unnecessary.

We do not understand and are unable to appreciate the pertinency and force of the argument made by counsel for appellees as to jurisdiction over subject-matter and review on error or appeal. Counsel, as we found, concede that the bill of the Furnace Company on its face must bring it within the scope of section 738. As it does not, as we claim, how is it possible to uphold the jurisdiction of the circuit court over Hill's interest in the property? Counsel repeatedly claim, as the court below did in its opinion, that the bill in the case at bar is not one that seeks to review the proceedings and decree in the former cause. This is a very strange claim in the face of the allegations in the bill and the prayer for relief. The facts are stated in the bill, and under the prayer for general relief we are entitled to any relief these facts warrant.

How are appellants to be protected in their rights? It is not denied that they are the *bona fide* owners of Hill's interest in and to the mortgages and the debt secured by them. They applied to the circuit court to protect their

interest therein long before any decree was entered against Hill, either on the bill or cross-bill (Record, page 10). The court below denied them leave to appear in that cause, to become parties thereto and protect their interests.

It was claimed they were purchasers or assignees *pendente lite*. What of it? They were entitled as such to their day in court, to the protection of their interests, and to the proceeds of sale if the court had authority to sell. Not being parties to that cause, how were they to review the courts' action, either on error or appeal? No other course was open to them than to file the bill they did in this case. This is not a collateral attack; it is a direct proceeding, and in this cause appellants are entitled to such relief as the facts warrant.

Had the court below permitted appellants to have appeared in the original case, as we claim it was bound to do, it never would have rendered the final decree nor taken the action it did.

We claim that in this case all that the court below did in the National Furnace Company's case, in so far as it affects the interests of appellants and their assignor, Hill, is before this court for review, so far as the record discloses the action of the court below, and on such review the appellants are entitled to the relief they seek.

On page 17 of their brief counsel for appellees claim the Furnace Company's bill was filed under the statutes of Illinois, and quote the section.

A reading of the bill will be sufficient to show that it does not present, in any aspect of it, a case to warrant a court of equity to dissolve the corporation mortgagor. All that was charged was the creation of an unlawful preference to secure *bona fide* debts and the incurring of an indebtedness in excess of its capital stock. Neither of these are by statute or in equity made grounds for the dissolution of a corporation or the forfeiture of its charter.

Neither was the Furnace Company entitled to bring such a

suit; its debts were not due; it was not a stockholder; it had no lien on the property mortgaged. We have been unable to find a single case warranting the claim that such a creditor, or any creditor, or stockholder even, was entitled to maintain a suit for the dissolution of a corporation or forfeiture of its charter because the corporation had given one or more of its creditors preferences, or had created an indebtedness in excess of its capital stock.

As we said in our brief in this case (page 20), the supreme court of Illinois has construed the act in question and confined it to a certain class of corporations, and the Furnace Company's bill did not set forth that the Moline Malleable Iron Works was one of the class covered by the statute.

Even if it were, can it be contended that such a suit is one contemplated by section 738? We claim it is not.

It will be noted here that in the final decree in the case of the National Furnace Co., as appears by the plea (Rec., p. 27), the court did not hold the mortgages invalid as to Hill, because they were unlawful preferences, as it is alleged they were in the bill of the National Furnace Co. They were not, in fact, unlawful preferences as alleged in the bill. The statutes of Illinois do not make them such, even on the allegations in the bill, and the cases cited by counsel for appellees in their brief, page 22, to wit, 120 Ill., 208, and 129 U. S., 329, are not pertinent. The Moline Malleable Iron Works in making the mortgages did not at the same time make a deed of assignment for the benefit of creditors. It was not a case for the application of the one-transaction theory. The company gave mortgages to secure *bona fide* debts, as it had a right to do, and even on the allegations in the bill of the National Furnace Co. no case of unlawful preference is shown.

Counsel for appellees fail to cite any Illinois statute or decision upholding their claim that the bill of the National Furnace Co. on its face, admitting its allegations to be true, presented a case of unlawful preference as to Hill or grounds

for the dissolution of the corporation. It is a novel claim that the creation of *bona fide* indebtedness by the directors of the corporation, for the business of the corporation, in excess of its capital stock, will vitiate a mortgage given by the company to a director to secure its own debt. The only penalty or effect of the creation of the debt according to the statute, so far as we are advised, is to make the director creating or assenting to the creation of the debt personally liable for the excess over the capital stock.

It is neither a ground for dissolution of the corporation nor the setting aside of a mortgage otherwise valid.

Such being the character of the bill of the National Furnace Co., how can it be claimed that on its face it authorized the circuit court to entertain jurisdiction of Hill's interest in the property?

Hill, being a non-resident, was within the protection of the statute. That entitled him to be sued only where he resided or could be found. As against him, in order to entertain jurisdiction of him and his interest in the property, it must affirmatively appear on the face of the bill of the National Furnace Company that the court had such jurisdiction; and that bill on its face must show such a case as was not liable to general demurrer; otherwise there was no case and no jurisdiction. In that case the bill must show "*a case*," for jurisdiction rests on the case, and can only be exercised over Hill provided there is such a case.

The prayer of the bill of the National Furnace Company does not make or tend to make the case. It is the allegations of fact that make the case.

Admitting all these allegations to be true, we say there is no case; hence no right to take jurisdiction of the interest of the non-resident in the property, and no right to make an order under section 738.

Touching any and all other matters in the bill of the National Furnace Company not affecting Hill or his interest in the mortgaged property we have no concern. It was only

necessary for the purposes of the case at bar to make parties to it those interested in the property as appears of record, and this applies to every aspect of the case. Failure, however, to make all parties interested parties, would not prevent us from obtaining the relief we are entitled to.

II.

"*Service of the Order on Hill under the Original Bill Gave Jurisdiction.*"

Pages 25 to 30 of the brief of counsel for appellees discuss the above proposition. Counsel, after quoting section 738, refer to Shaniwald *vs.* Lewis, 5 Fed. Rep., 510. We again refer the Court to this case as containing a clear and instructive construction of section 738 and the cases covered by it. On page 516 the Court say:

"In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not to cases in which it is sought to reach and appropriate the general property of a defendant to the payment of debts," &c.

It seems clear to us that the suits referred to must be entered by one who has the right to assail the lien, cloud, or encumbrance sought to be removed. He must have such an interest in the thing—in the title to the thing—as to enable him to apply to a court of equity to remove it. It is not the mere existence of a lien, cloud, or encumbrance on the title that confers jurisdiction. He who brings the suit must in law or equity have such a specific lien on, or claim to the property affected, as to entitle him to maintain the suit, to remove or assail the lien, cloud, or encumbrance. It is this essential jurisdictional fact which counsel for appellees ignore and which the bill of the Furnace Company did not contain.

May any volunteer assail the lien or encumbrance of the

non-resident lienholder and compel him to defend his right in the property in a district other than that in which he resides? Certainly not. It is clear, under the elementary principles of equity and the repeated decisions of this Court, that the National Furnace Company was not entitled to maintain a suit to set aside the mortgages given to George H. Hill, and that therefore their bill did not present a case covered by section 738, and was not a case in which the circuit court was authorized under section 738 to make an order on a non-resident owning or claiming an interest in the property. This is true, even though, in fact, in a proper case, the mortgage interest of Hill might have been successfully assailed, because some other person than the National Furnace Company might have maintained a suit that did confer jurisdiction on the court below over Hill and his interest in the property.

III.

Jurisdiction by the Cross-Bill.

Pages 30 to the end of the brief contain a discussion of the right of the court to acquire jurisdiction over Hill by the cross-bill of Wheelock & Carson.

This part of the brief contains some remarkable statements.

On page 31 counsel claim that we concede that the nature of the cross-bill would have authorized service on Hill under section 738, and refers to page 27 of our brief and quotes therefrom. We fail to see how our statement, that the jurisdiction of the circuit court could not be enlarged by the cross-bill, is a concession that, in fact, it was. Again, on page 30, counsel claim that "*the cross-bill was in substance to enforce prior existing liens.*"

How? As we have found (see statement, *supra*), the cross-bill wholly failed to disclose any ground for relief or to

warrant the enforcement of the so-called existing lien. It wholly failed to aver any default or anything under the terms of the mortgage to warrant foreclosure.

We submit, in answer to the lengthy discussion of what a cross-bill may do, the following:

If no case was presented by the bill of the National Furnace Company against Hill, and the court could not acquire jurisdiction over him by that bill, how could a cross-bill give the court jurisdiction to assail and destroy his mortgages, that being the express purpose of the original bill?

How could the court accomplish by the cross-bill what it could not by the original bill, and which it was the purpose of that bill to accomplish? On the dismissal of the original bill what was there left? How did the court acquire jurisdiction of the subject-matter or the persons, if there were no case made by the original bill, and the National Furnace Company had no right to maintain the suit?

The cases cited by counsel (so far as we have examined them) are not pertinent to this case. In all of these cases the court by the original bill had acquired jurisdiction of the subject-matter of the property, and the cross-bill simply sought to have all liens thereon determined.

In the case at bar the court below did not acquire jurisdiction of the subject-matter—of the property—by the original bill of the National Furnace Company, and therefore could not acquire it by the cross-bill.

It is begging the question to assume that it did acquire jurisdiction of the subject-matter by the original bill. If it did, it did not need the aid of the cross-bill; if it did not, the cross-bill could not be used to and did not enlarge its jurisdiction over Hill and his interest in the property. This is not such a case as the language of the court in 14 Blatch., 373, applies to.

Hill was sought to be made a party to the original bill. His mortgages were assailed by that bill. The cross-bill was

used as an aid to do the same thing, and to give jurisdiction where none had been theretofore acquired.

Wheelock, who filed the cross-bill, was, as appears by the record and the original bill of the Furnace Company, a citizen of Illinois, and Hill, as appears in the same way, to be a citizen of Ohio. Wheelock could not, therefore, on the ground of citizenship, have maintained an original bill against Hill in the Federal courts of Illinois.

How, then, could the court below have acquired jurisdiction over Hill's interest in the property by the cross-bill if it did not by the original bill? Treating the cross-bill as an original bill, the court below, on the ground of citizenship alone, was without jurisdiction to entertain it.

On page 27 of the record the court below found in its final decree, as set forth in the plea, as follows:

"That said George H. Hill was not entitled to any lien or security by reason of said trust deed and mortgage, and that the same were invalid as to him, because the liabilities of said company in excess of its capital stock were incurred while he was one of its directors and its vice-president, and with his knowledge and assent thereto, and because he was named in said trust deed and chattel mortgage as a beneficiary thereunder, through his influence and control over said corporation as an officer thereof."

We submit that neither of these reasons were sufficient in law or equity to warrant the court below in setting aside these mortgages as to Hill.

Certainly the creation of indebtedness in excess of the capital stock is no ground for declaring a mortgage given to a director to secure a *bona fide* debt as invalid.

As to the other ground, in this case the mortgages were given not to secure pre-existing debts, and this fact appears by the record, but to secure Hill on notes which he endorsed for the company and which he had to pay. He endorsed these notes in consideration of receiving the mortgages, and

under these circumstances, as thus disclosed by the record, the mortgages were valid.

Under any aspect of this case appellants are entitled to a reversal of the decree below, and to the relief prayed for in their bill.

Respectfully submitted,

THOS. McDOUGALL,
Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

WILLIAM S. MELLEN, TRUSTEE, FOR THE USE OF SOPHIA H. BOYD, AND SOPHIA H. BOYD,
Appellants,

vs.

THE MOLINE MALLEABLE IRON WORKS ET AL.,
Appellees.

BRIEF FOR APPELLEES.

CHARLES M. OSBORN and
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STATEMENT.

The question presented by this record is as to the sufficiency of the plea interposed by the appellees to the bill of complaint, which was in substance an ordinary bill to foreclose two trust conveyances, a trust deed and chattel mortgage, given by the Moline Malleable Iron Works, a corporation of the State of Illinois, and engaged in business at the city of Moline, Illinois, to the appellee, Charles F. Hemenway, to secure certain endorsers or guarantors for it from loss by reason of their endorsements or guaranties. One of the beneficiaries named in these trust instruments was George H. Hill, a resident of

the State of Ohio, and the appellants base their right to the relief sought by their bill upon an assignment or transfer made by George H. Hill on April 12, 1884, as their bill alleges, to the appellant, Mellen, in trust for the use of the appellant, Sophia H. Boyd, of all his interest under these two trust instruments.

In bar to the relief sought by this bill the appellees pleaded the final decree rendered on the 26th of June, 1884, upon the original and supplemental bills, and the cross-bill of the appellee, Wheelock, in the suit brought by the National Furnace Company in the court below against the Moline Malleable Iron Works, George H. Hill, and others. This plea was sustained on the hearing, and decree was entered dismissing the bill.

On the 2d of July, 1883, the National Furnace Company, as a creditor of the Moline Malleable Iron Works, exhibited its bill of complaint in the court below on its own behalf and on behalf of all other creditors, making defendants thereto the Moline Malleable Iron Works, George H. Hill, Wheelock, Carson, the Keator Lumber Company, Charles F. Hemenway, and others. It alleged (we follow the statements of the defendants' plea, Abst., 24) that at the time when the Moline Malleable Iron Works executed the trust deed and chattel mortgage, which is in controversy here, it was insolvent, and its indebtedness was largely in excess of its capital stock, and that its officers and directors had assented to the creation of its indebtedness; that these conveyances were fraudulent and void as against the creditors of the company. It prayed for a receiver and a decree adjudging the trust deed and chattel mortgage fraudulent and void as against the complainant and the creditors of the iron company.

On August 1, 1883, upon the application of the furnace

company for the preservation of the property pending its suit and for the benefit of all parties interested therein, the court appointed R. E. Jenkins receiver of the iron works and of its property, and under the court's order the iron works conveyed and delivered possession of its property to the receiver.

On November 28, 1883, Wheelock, appellee herein, by leave of the court, filed his cross-bill in the said cause, to which he made the iron works, the furnace company, George H. Hill, Hemenway and Carson, defendants. This cross-bill alleged that Wheelock and Carson, at the request of the iron works, and in reliance upon its promise to give them security from any liability to loss, became guarantors for it upon its commercial paper to the amount of $50,000; that afterwards, on November 12, 1882, a resolution was adopted by the iron works authorizing its officers to execute proper instruments to secure them from loss, and thereafter, at Wheelock's request, said corporation executed the said trust deed and chattel mortgage; that after the adoption of this resolution George H. Hill, then a stockholder and director of the company, became a guarantor for it, and by his influence as an officer of the company he was, upon the execution subsequently of the trust deed and mortgage, made a beneficiary under them. That the company was indebted largely beyond its capital stock, and Hill had assented to the creation of this indebtedness and was liable to the creditors for this excess; and that the trust deed and mortgage were valid as to Wheelock, Carson and the Keator Lumber Company, and Hill was not entitled to have the security thereof. That the property covered by the trust deed and chattel mortgage was rapidly depreciating in value, and should be sold as soon as possible. It prayed that the trust deed and

chattel mortgage might be declared valid, and the receiver might be directed to sell the property covered by the trust deed and mortgage immediately, and for the application of the proceeds in satisfaction of the indebtedness guaranteed by Wheelock, Carson and the lumber company, and the balance distributed *pro rata* among the creditors of the company.

On the filing of this cross-bill an order was entered directing the defendants named therein to plead, answer or demur to it on or before December 20, 1883; and George H. Hill being a non-resident, that a copy of the order be served on him on or before December 5, 1883; and that in case Hill did not appear and plead, answer or demur to the cross-bill within the time limited, it should be taken as confessed by him. A copy of this order was served on Hill December 1, 1883.

On December 22, 1883, the receiver filed his petition, in which he alleged that the property of the iron works in his possession as receiver, including that covered by the trust deed and mortgage, was rapidly depreciating in value, and for the interest of all persons interested in it and for the benefit of creditors, it should be sold at once, and prayed that he might be authorized to offer the property for sale. On this petition an order was entered directing the receiver to offer and advertise all the property for sale, and report bids to the court.

On the receiver's advertising the property for sale under this order, the appellee, Wheelock, made the highest bid, $30,000, which being reported to the court, no exceptions to the acceptance of this bid having been made within the time fixed by the court, it was ordered on the 3d of March, 1884, should be accepted, and the receiver

was directed to sell and convey the said property to him. which he thereupon did.

On March 3, 1884, it was ordered that Hill appear and plead, answer or demur to the original and supplemental bills, on or before April 15, 1884, and that a copy of this order be served on him on or before March 15, 1884, and that in default of his appearance as directed, the original and supplemental bills should be taken as confessed. A copy of this order was served on Hill within the time fixed, and on April 22, 1884, Hill not appearing as directed the original and supplemental bills were, by the order of the court, taken as confessed by him.

On the 23th of April, 1884, Hill not having appeared and pleaded, answered or demurred to Wheelock's cross-bill, it was ordered that the cross-bill be taken as confessed by him.

The original and cross-cause then came on for hearing, and on June 26, 1884, final decree was rendered on the original and supplemental bill, and on the cross-bill, in which decree it was found that the iron works was indebted in the sum of $75,000, in excess of its stock; that the trust deed and chattel mortgage were valid as to Wheelock, Carson and the lumber company, but that Hill was not entitled to any lien or security under them and they were invalid as to him, because he as director and vice-president of the iron company, had assented to the creation of its indebtedness in excess of its stock, and had though his control and influence as an officer over the corporation, caused himself to be named as a beneficiary thereunder; and it was decreed that Wheelock, Carson and the lumber company were entitled to have the proceeds derived from the sale of the property, covered by

the trust deed and mortgage in part satisfaction of the sums paid by them for the iron company.

Before the hearing and before this final decree was rendered, but after every other proceeding above stated had been taken, on the 5th of May, 1884, the appellants filed their bill of complaint in the case now at bar. As we have already stated, this bill is, as to the relief sought by it, an ordinary bill to foreclose the trust deed and chattel mortgage, which the bill of the furnace company, in the cause then pending, had attacked as fraudulent and void, and sought to set aside, and the lien of which the cross-bill of Wheelock in that cause sought to enforce against the property, alleging them to be valid as to him, Carson and the lumber company, but that Hill was not entitled to have the security thereof, and which, by the final decree rendered subsequently, were decreed to be invalid as to Hill, but valid as to Wheelock, Carson and the lumber company.

The appellants base their right to maintain their bill of foreclosure upon an assignment or transfer, which they allege was made by George H. Hill to the appellant, Mellen, on the 12th of April, 1884, in trust for the use and benefit of the appellant, Sophia H. Boyd, of all his interest, right and title under the two trust conveyances, the trust deed and chattel mortgage. Their bill alleges (Rec., 4–11; Trans., 2–4) that the Moline Malleable Iron Works, on June 23, 1883, executed and delivered its trust deed to Charles F. Hemenway, conveying to him the property described therein in trust, to secure the appellees, Wheelock, Carson and the lumber company, and George H. Hill from any loss or damage by reason of their having endorsed or guaranteed its paper, Wheelock and Carson, to the amount of $49,000, Hill $20,000 and the

lumber company $1,000. It sets forth (Trans., 2, 3) the language of the trust deed creating and defining the trusts. From this it appears that Wheelock and Carson had been promised by the iron works a lien on the property mortgaged before they became guarantors for it, and had in reliance on this promise become guarantors and endorsers for it. It alleges the execution of the chattel mortgage on the same trusts and at the same time, and as part of the same transaction.

It alleges that George H. Hill was compelled by the default of the Iron works to pay $20,000 on the notes of the company which he had guaranteed and endorsed for it, and which were secured by the trust deed and chattel mortgage. That (Rec., 13), "for a good consideration" George H. Hill, on April 12, 1884, sold and conveyed his entire interest in and title to the said trust deed and chattel mortgage and the $20,000 indebtedness secured thereby to Mellen in trust for Sophia H. Boyd; that the said $20,000 remains unpaid and the complainants are entitled to have the trust deed and chattel mortgage foreclosed.

The bill then makes the following references to the cause then pending brought by the National Furnace Company. It sets out the substance of the original bill (Trans., 6, 7), and quotes *verbatim* its prayer (Trans., 8). As stated in the Mellen bill it appears that the charges of the furnace company's bill in substance were, that the iron works was insolvent, its indebtedness largely in excess of its capital stock, for which its directors and officers were liable, and that the trust deed and chattel mortgage were invalid and fraudulent as amounting to an assignment with preferences; and the prayer was in substance that the corporation might be dissolved and its business closed up and a receiver appointed to do all things necessary for

the closing up of its affairs; that the corporation and its officers, etc., might be enjoined from making any disposition of its property; that the trust deed and mortgage might be adjudged fraudulent and void, and its property sold and distributed among its creditors.

The Mellen bill then states the filing of supplemental bills, and avers that neither the original or supplemental bills showed that the furnace company had any lien or claim to the property covered by the trust deed and chattel mortgage, and alleges that the furnace company had no right to bring suit to set aside the trust deed and mortgage, "having no lien on or claim to said property and "no interest therein whereby said court on its behalf could "or had a right to assume jurisdiction of said cause, and "of George H. Hill's interest in said property or of said "property or to compel the said Hill at any time to plead, "answer or demur thereto or to make any order or de-"cree in the premises affecting said property or the in-"terest of said Hill therein." (Trans., 9.)

It states the appointment of the receiver, the sale by the receiver to Wheelock under the court's order, and the confirmation of this sale. That "after the sale of said "property, * * * the court without any authority, "and for the first time made an order on George H. Hill "as a non-resident defendant, * * * to appear and "plead to the original and supplemental bills on or before "April 15, 1884, and to be defaulted unless he so appeared; "but Hill did not appear, and has never entered his ap-"pearance * * *" (Trans., 10). That the appellant Mellen made a motion for leave to appear in said cause and be made a party thereto, which motion the court overruled.

It avers "that said order of said court selling said

" property was wholly null and void; that at the time the " same was made, the court had not acquired jurisdiction " of said property, nor of the person of said Hill or his " interest in the property so sold; that said court did not " acquire by said cause jurisdiction to enquire into the " validity of said trust deed and chattel mortgage, nor " jurisdiction over the person of said Hill, nor of the " property covered by and embraced in said deed and " chattel mortgage, and all of its orders in the premises " as affecting said property, and the said Hill or his in- " terest in said property, and the interest of your orators " thereunder were null and void and without authority in " the premises."

It makes defendants the iron works, Hemenway, Wheelock, Carson, S. T. Walker, J. S. Keator and B. C. Keator, as partners, omitting the National Furnace Company, the complainant in the other suit, and a number of the defendants therein. It omits to make George H. Hill a party. It prays (Trans., 11) for a foreclosure of the trust deed and chattel mortgage, for a determination of the liens thereunder, the sale of the property and distribution of the proceeds.

It will be observed that this bill makes no mention of Wheelock's cross-bill, or of the service of the order on Hill to appear and plead, answer or demur thereto, or of the orders of default against Hill both on the cross-bill and the original bill. Nor do the complainants therein by any supplemental bill bring before the court the final decree, rendered in June, 1884, after their bill was filed.

The defense which is pleaded in bar by the appellees to this bill, is that by the final decree of June 26, 1884, in the former cause, it was decreed that the trust deed and chattel mortgage were invalid as to Hill, and that he was

not entitled to have the benefit of their security. The plea sets out with sufficient particularity the various proceedings in the former cause, that were necessary to show the nature of the original and cross cause, the jurisdiction which the court had over Hill on both the original and cross-causes, and the substance of the final decree rendered therein. We have already stated in their chronological order the matters set forth in this plea.

Statements are made in the brief for the appellants, that indicate a total misapprehension on the part of counsel for appellants of the gist of this plea. On page 31 it is said that the plea "simply sets up as a defense the "order made in the cross-bill in the case brought by the "National Furnace Company. * * * That order, as "we have stated, was made on the cross-bill some time "after the appellants applied for leave to the court to be "made parties to that cause and was made by the court "when it was without jurisdiction of said Hill or his in-"terest in the property, which leave the Circuit court "refused, and which order or decree on the cross-bill was "made long before any decree had been rendered on the "original or supplemental bills in the cause. The prop-"erty was sold and sale confirmed before the Circuit "court issued any order to Hill to plead to the original or "supplemental bills. The final decree on the merits was "not rendered until some time after this suit was entered "in the Circuit court."

The statements of this paragraph are not very clear, but they seem to indicate a misapprehension of the gist of the plea, and to assume that the order or decree pleaded in bar was some one of the interlocutory orders entered by the court before the final decree, which is in fact pleaded in bar, was rendered. The only interlocutory

orders referred to in the plea, which were entered after appellants applied for and were refused leave to become parties, were the decrees against Hill *pro confesso*, on the original and cross-bill. The plea does not set up these interlocutory orders in bar, though it states them as a part of the necessary introduction to the real defense, viz: that by the final decree in the cause, rendered as well in the cross-cause as in the original cause, Hill, in whose right the appellants, who are mere volunteers *pendent elite*, can only claim, was adjudged to have no rights under this trust deed and chattel mortgage which they now seek to foreclose.

The sequence of the matters stated in the bill and the plea is important. The only order entered in the cause, before Hill was served with the order to appear and defend against the cross-bill, was that appointing the receiver. The receiver's petition for sale of the property was not filed until after the expiration of the time within which Hill was ordered to appear in the cross-cause. The order for sale on this petition, the sale and the confirmations of the sale were not made for some time after service on Hill under the cross-bill. And it was after these proceedings in the cause and after service on Hill of an order under the original bill to appear and defend, that his assignment or transfer of his claim of right and interest under the trust deed and chattel mortgage was taken by the appellants as mere volunteers. They stand merely in Hill's shoes, and the decree in the cause is conclusive on them, if valid and binding as to Hill.

Complaint is made in the bill and repeated in the argument for appellants that the court refused to allow the appellants to become parties to that cause. As the sole question in this case is whether the final decree in that

cause is or not valid as against Hill, and as this decree must be either conclusive on the appellants, or wholly null and void, so far as it affects the interest claimed by Hill under the trust deed, we did not deem it material or proper to refer in our plea to the matters that appeared in the former cause, that undoubtedly led the court in the exercise of its judicial discretion to refuse this application. At the close of its opinion on the hearing of this plea (Trans., 31) the court refers to a former application made by Hill (not referred to in the plea), which very probably led to the refusal of the motion made by the appellants. It is clear, however, that the action of the court in refusing this application cannot in any way add to or affect the question as to the conclusiveness of the final decree; and it needs no further consideration.

The sufficiency of the plea was argued before his Honor Judge Blodgett, and his opinion sustaining it has been made a part of the record. (Trans., 30, 31.) The gist of the opinion is "that the proceedings in the National Furnace Company case and the cross-bill of "Wheelock show such full and complete jurisdiction of "the subject-matter and the parties, as to make all these "proceedings binding on Hill and on complainant who is "a mere volunteer assignee *pendente lite*. * * * This "bill does not purport to be a bill for the review and "correction of errors made by the court in the National "Furnace Company case, and lacks the essential features of such a bill. On the contrary, this bill proceeds on the assumption that all that was done in the "National Furnace Company case was void as against "Hill and the complainants as the assignees of his interest in the trust deed. * * * The cross-bill of "Wheelock seems to me to have been in all respects

"germane to the purpose of the original bill—
"that is, the purpose of the cross-bill was to assert, as
"it did, that the trust deed was valid so far as Wheel-
"lock was concerned, and alleged invalidity so far as
"the defendant Hill was concerned, and no decree was
"entered determining Hill's right until he was prop-
"erly before the court by due service of process."

Counsel's statement of this opinion (Arg.,13.) leaves the impression, which we think entirely erroneous, that the court based its decision, that it had prior to the rendering of the final decree acquired jurisdiction over George H. Hill to the extent of his interest in this property, entirely on the service under the original bill. On the contrary, the opinion, we think, views and treats Hill as certainly brought under the court's jurisdiction in the cross-cause, and clearly treats the decree in so far as it holds the trust deed and mortgage invalid as to Hill as rendered on and granting the affirmative relief sought by the cross-bill.

Considering the scope of appellants' bill, its allegations and the nature and character of relief sought by it, there can be but one question raised on this plea: Whether the court had jurisdiction of Hill so that its decree that the trust deed and chattel mortgage were invalid as to him, and that he was not entitled to the benefit of the lien given by them, was binding on him or whether it was a nullity. Confining the argument to its proper limits the inquiry here must be solely as to the jurisdiction of the court over the subject-matter and over Hill, and if it had such jurisdiction, its decree, however erroneous and subject to reversal on appeal or review in a proper proceeding brought for that purpose, forms a complete bar to the prosecution of this suit.

The argument for appellants concisely stated is that the original bill did not warrant service of an order on a non-resident to appear, and that the court did not acquire jurisdiction over Hill by the service of this order under the original bill; that the court could not acquire jurisdiction over him by service of an order to appear under the cross-bill, and therefore they conclude that there was no jurisdiction over Hill, and the decree so far as he was concerned was a nullity.

We shall contend that the court had full jurisdiction over the subject-matter of the cause; that it acquired jurisdiction over Hill in both the original and cross-causes, but that if the service on Hill of the order under the original bill was ineffective to give the court jurisdiction over him, the service under the cross-bill brought him under the court's jurisdiction so that the decree which is here pleaded in bar and which was rendered as well in the cross-cause as the original cause, and grants the relief sought by the cross-bill, is conclusive on him and the appellants claiming in his right, and can not be reviewed in this proceeding. In other words, the cross-cause and the decree rendered thereon cannot be treated as a nuliity, and until reversed on appeal or set aside on review it must be held conclusive in every collateral proceeding.

ARGUMENT.

I.

THE COURT HAD JURISDICTION OVER THE SUBJECT-MATTER OF THE NATIONAL FURNACE CO. CAUSE. THE REGULARITY OF ITS ORDERS AND PROCEEDINGS IN THAT CAUSE IS NOT OPEN TO CONSIDERATION OR QUESTION IN THIS CASE. WHETHER ERRONEOUS OR NOT ITS ORDERS AND DECREE ARE CONCLUSIVE AND BINDING ON THE PARTIES WHO WERE BROUGHT UNDER THE COURT'S JURISDICTION, UNTIL REVERSED OR SET ASIDE IN SOME PROPER PROCEEDING, AND CANNOT BE QUESTIONED IN A COLLATERAL PROCEEDING.

1. *The bill in this case is not a bill of review or a bill in the nature of a bill of review, but is in substance an original bill of foreclosure.*

We do not understand that the claim is made by appellants that their bill in form or substance seeks a review of the proceedings and decree in the former cause. On the contrary, their bill proceeds on the theory that the action of the court was wholly void as to Hill. They do not ask a review of the proceedings in that cause for error appearing on the record, or for any other reason; they do not by any supplemental proceeding bring the final decree before the court in their cause; they do not make the complainant in the former cause and others of the parties to it parties here. In short, their bill is in no respect a bill of review or in the nature of such a bill.

In the argument for appellants (pages 28, 29) the cases

of *The Minnesota Company* v. *The St. Paul Company*, 2 Wall., 609, and *The Pacific R. R. of Missouri* v. *The Mo. Pa. R. R. Co.*, 111 U. S., 505, are referred to as being similar in form and character to the present case, and as furnishing a precedent for their bill.

If the appellants are correct in their claim that the court had no jurisdiction over Hill, it would necessarily follow that its decree so far as concerned his claim of interest in the property covered by the trust deed and chattel mortgage was an utter nullity, and no precedent would be needed for a bill to enforce his claim of right regardless of such a decree. The two cases which are cited have nothing in common with the present case; they were essentially in the nature of bills of review, and the question decided was as to whether, with reference to the jurisdiction of the federal courts, such bills should be treated as original and independent bills, or as ancillary to the cause, the proceedings in which they sought to bring before the court for review. This question has no relevancy here.

The validity of the proceedings and decree in the National Furnace Company cause comes in question here purely collaterally, and if the court had jurisdiction over the subject-matter of that cause and over Hill its decree must be held conclusive and a bar to the prosecution of this suit, wholly regardless of the question as to whether this decree is erroneous.

2. *The Circuit court had full jurisdiction over the subject-matter of the National Furnace Company cause, within the meaning of the doctrine that makes its orders and decree therein conclusive in every collateral proceeding on the parties who were brought under its jurisdiction.*

It is utterly impossible to maintain successfully that the Circuit court did not have general jurisdiction over the subject-matter of the National Furnace Company's bill. Indeed, notwithstanding the allegations of appellants' bill charging a want of such jurisdiction, their argument has been limited to the point that the complainant in that cause was not seeking to enforce a prior lien, and the court could not therefore acquire jurisdiction over Hill by service of an order under its bill.

The Furnace Company's bill was brought under the provisions of the twenty-fifth section of Chap. 32, Revised Statutes of Illinois. That section is as follows:

SEC. 25. If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money after demand made by the officer, to be returned "no property found," or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall

have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs as commanded by the decree of such court. Said receiver shall be in all cases a resident of the State of Illinois, and shall be required to enter into bonds payable to the people of the State of Illinois, for the use of the parties interested, in such penalty and with such securities as the court may, in the decree or order appointing the same, require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him or it, from the county where the cause of action accrued to the sheriff of any county in this state for service.

This statute gives express power to courts of equity to dissolve or close up the business of any corporation and appoint a receiver therefor "on good cause shown." Whether this statute is to be considered as merely declaratory or as creating anew remedy against corporations and vesting in courts of equity a new power over them is not material; but there can surely be no question as to the power and jurisdiction vested by this statute in courts of equity over the subject-matter of a suit for the dissolution of a corporation and the distribution of its assets. Nor can there be any doubt but that the decree of a court of equity rendered in a suit brought under this statute, is conclusive upon the parties to the cause, and cannot be questioned or attacked collaterally.

"Jurisdiction is the power to hear and determine the "subject-matter in controversy between parties to a suit, "to adjudicate or exercise any judicial power. * * * "If the law confers the power to render a judgment or "decree then the court has jurisdiction; what shall be ad-

"judged or decreed between the parties, and with which "is the right of the cause, is judicial action." * * *

Rhode Island v. *Massachusetts*, 12 Peters, 657.

"In its most general sense the term 'jurisdiction' when "applied to a court, is the power residing in such court "to determine judicially a given action, controversy or "question presented to it for decision. If this power "does not exist with reference to any particular case, its "determination by the court is an absolute nullity; if it "does exist, the determination, however erroneous in fact "or in law, is binding upon the parties until reversed or "set aside in some proceeding authorized by the practice "and brought for that express purpose."

Pomeroy's Equity Jurisprudence, Vol. I, § 129.

"So there is a more general meaning to the phrase "'subject-matter,' in this connection, than power to act "upon a particular state of facts. It is the power to act upon "the general, and, so to speak, the abstract question, and "to determine and adjudge whether the particular facts "presented call for the creation of the abstract power. "* * * We conclude that jurisdiction of the subject-"matter is the power lawfully conferred to deal with the "general subject involved in the action."

Per FOLGER, J., in *Hunt* v. *Hunt*, 72 N. Y.

In *Elliott* v. *Peirsal*, 1 Peters, 340, this court says: "When a court has jurisdiction it has a right to decide "every question which occurs in the cause, and whether "its decision be correct or otherwise, its judgment, until "reversed, is regarded as binding in every other court."

Rose v. *Himely*, 4 Cranch, 241.

Thompson v. *Tolmie*, 2 Peters, 163.

In *Cornett* v. *Williams*, 20 Wall., 250, it is said: "The "settled rule of law is that jurisdiction having attached in "its original case, everything done *within the power of that* "*jurisdiction*, when collaterally questioned, is to be held "conclusive of the rights of the parties, unless impeached "for fraud, every intendment is made to support the pro- "ceeding. It is regarded as if it were regular in all things "and irreversible for error. In the absence of fraud no "question can be collaterally entertained as to anything "lying within the jurisdictional sphere of the original case."

This last definition or statement of the rule is referred to in *Windsor* v. *McVeigh*, 93 U. S., 274, as being more absolutely correct.

We cite the foregoing statements or definitions of this universally recognized doctrine with perhaps unnecessary particularity, for the reason that this principle applies to every question in this case. Every objection that can be taken against the sufficiency of the plea of this decree, and against its conclusiveness upon Hill and the appellants, will be found upon consideration to go to the exercise by the Circuit court of its jurisdiction rather than to its jurisdiction; and every objection is answered by this rule, that makes the judgment of the court having jurisdiction over the parties and subject-matter conclusive.

It is argued by counsel for appellants (argument, 19 to 21) that the Furnace Company's bill did not give it "a right "to invoke the aid of a court of equity, and seek for a "dissolution of that company;" that "the bill did not on "its face entitle it to a decree dissolving the corporation"; that the absence of averments as to the incorporation of the iron works "would have made the bill liable to de- "murrer." This line of argument would be entirely proper on appeal from the decree in that cause; but it has

nothing to do with the real question here of the court's jurisdiction over the subject-matter of that cause. If we were to admit that these criticisms and objections to the action of the court were well taken, the conclusion would simply be that the Circuit court's decree might be subject to reversal on appeal; but we do not propose to discuss or argue the question, and shall treat it as not material or relevant here.

We think that counsel for appellants has misconceived the nature and purpose of the Furnace Company's bill. It was not a creditor's bill for the discovery of equitable assets or to get the aid of a court of equity in removing hindrances to the collection of a debt by legal process, but a bill seeking the administration and distribution of a trust fund. Upon the insolvency of a corporation, or its dissolution and the closing of its affairs, its property and assets form, in equity, a trust fund for the creditors primarily. To the maintenance of a suit for the administration of this trust fund a judgment is not a pre-requisite.

Considering the express provisions of this statute, giving power to courts of equity to dissolve a corporation and close up its affairs "on good cause shown," we submit that the subject-matter of a suit brought under this statute is within the jurisdiction of courts of equity, and that the decree of the court in such a suit is conclusive upon the parties to it.

The cause shown by the Furnace Company's bill was the insolvency of the Iron Company, and its execution of the trust deed and chattel mortgage, which were charged to be fraudulent and void as to its general creditors, as amounting to an assignment with preferences, contrary to the statute of Illinois concerning voluntary assignments. We would suggest that, independently of the express

provisions of the statute, which we have above set forth, a court of equity has jurisdiction over the subject-matter of a bill by a creditor to set aside conveyances which are alleged to be fraudulent and void because amounting to an assignment by the debtor with preferences, and for the administration of the estate.

Preston v. *Spaulding*, 120 Ill., 208.
White v. *Cotzhausen*, 129 U. S., 329.

3. *The objections taken by the appellants' bill and by their argument to the orders appointing the receiver and for sale of the property on the receiver's petition are not relevant or material to the question of the conclusiveness of the decree upon Hill and the appellants.*

The receiver was appointed August 1, 1883, upon the application of the Furnace Company. Hill was not served with the order under the cross-bill to appear and defend to it until December 1, 1883; so that it must be conceded that at the time the receiver was appointed there was no jurisdiction over Hill either under the original or cross-bill.

The receiver's application for leave to sell the property was not made until after Hill was in default on the cross-bill; and at the time of the sale, though no order of default had been taken on the cross-bill, he still remained in default. He was not served with the order under the original bill to appear and defend until after the sale had been made and confirmed.

But the appointment of the receiver and the sale of the property were purely interlocutory proceedings in the cause. They are not pleaded in bar to this bill, though they are with other proceedings in the cause stated in the plea, but solely for the purpose of setting

forth with sufficient particularity the nature of the proceedings that culminated in the final decree of June 26, 1884, which the plea does interpose in bar to the prosecution of this suit. By this decree it was adjudged and determined by the court that this trust deed and chattel mortgage were invalid as to Hill and that he was not entitled to any lien or security by reason of them (Trans., 27.), and it was decreed that Wheelock, Carson and the Lumber Company were entitled to receive the proceeds derived from the sale of the property covered by the trust deed and mortgage in part satisfaction of the sums paid by them for the Iron Company. If this decree is conclusive on Hill and the appellants until reversed on appeal or set aside in some proper proceeding brought for that purpose, the appointment of the receiver and the sale of the property can not possibly concern them. If the trust deed and chattel mortgage are invalid as to Hill and he is not entitled to their lien or security, neither he nor the appellants, who are purely voluntary assignees *pendente lite* and can only claim in his right, have any right or equity to maintain suit for their foreclosure. We therefore submit that the sole question here is whether the Circuit court had jurisdiction in the Furnace Company cause over Hill. If it did have jurisdiction over him then the decree is a conclusive bar to the prosecution of this suit, and the question as to the regularity or effect upon Hill of the court's orders, appointing the receiver and for sale of the property, is wholly immaterial and irrelevant. If the appointment of the receiver or the sale of the property were wholly void acts as to Hill, as claimed by appellants, the decree is none the less a bar to the prosecution of this suit.

The proposition, therefore, with which counsel for ap-

pellants closes the second point in his argument (Argt., 25), that if these proceedings were void as against Hill, "the court could not subsequently, as against Hill, who "did not voluntarily appear in said cause, make valid its "action by anything it might do thereafter," is not applicable. And the reason is that the decree, adjudging the trust deed and mortgages invalid as to Hill, and that he was not entitled to any lien or security under or by reason of them, is not in any respect founded upon these prior interlocutory orders in the cause. They were made by the court for the preservation of the property pending the litigation; while the decree was the determination and judgment of the court on the final hearing of the rights of the parties, with which the prior appointment of the receiver or sale of the property had nothing to do.

It may seem somewhat anomalous to speak of the court's selling the property of which it has taken possession, for its preservation, but that was in substance the ground of the receiver's application for leave to sell—to put an end to the rapid depreciation in value which it was suffering. A court of equity is vested with the power of selling the property in the receiver's hands, whenever such course becomes necessary to preserve the interests of all parties.

High on Receivers, §§ 192, 196.

There is no foundation in fact for the objections asserted in appellants' bill and argument against these interlocutory orders. Hill's only claim of interest in the property was that he was entitled under the trust deed and mortgage to a lien on it, and he could not complain even on appeal of the order appointing the receiver for the iron works and delivering to him the possession of its property.

And long before the sale of the property, he had been brought under the jurisdiction of the court by the service of the order to appear and defend in the cross-cause. We shall argue hereinafter that by the service of this order on Hill, under the cross-bill, the court acquired jurisdiction over Hill, so that its orders and its decree rendered therein became conclusive and binding on him, and cannot be treated as mere nullities.

But whether these interlocutory orders were irregular or not, is not material to the real question of the conclusiveness of this decree; which depends entirely upon whether the court acquired jurisdiction over Hill.

II.

THE COURT ACQUIRED JURISDICTION OVER HILL IN BOTH THE ORIGINAL AND THE CROSS CAUSES.

1. *The service of the order upon Hill under the original bill to appear and defend thereto conferred upon the court jurisdiction in the cause over him.*

Hill was served under the original bill with the order entered March 3, 1884, directing him to appear and plead, answer or demur to the original and supplemental bills on or before April 15, 1884, and on the 22d of April, being in default, a decree *pro confesso* was entered against him in the original and supplemental bills. This order of service was made pursuant to the provisions of section 8 of the act of March 3, 1875. This provides: "that when in any suit commenced in any "Circuit court of the United States, to enforce any "legal or equitable lien upon, or claim to, or to remove any "incumbrance or lien or cloud upon the title to real or

" personal property within the district where such suit is " brought, one or more of the defendants therein shall " not be an inhabitant of, or found within the said district, " or shall not voluntarily appear thereto, it shall be lawful " for the court to make an order directing such absent " defendant or defendants to appear, plead, answer or " demur by a day certain to be designated, which order shall " be servedon such absent defendant or defendants if practi- " cable, wherever found, * * * and in case such absent " defendant shall not appear, plead, answer or demur " within the time so limited * * * it shall be law- " ful for the court to entertain jurisdiction and proceed to " the hearing and adjudication of such suit in the same " manner as if such absent defendant had been served " with process within the said district; but such adjudi- " cation shall, as regards such absent defendant or de- " fendants, without appearance, affect only the property " which shall have been the subject of the suit, and under " the jurisdiction of the court therein within such dis- " trict. * * * "

The provisions of this statute were complied with in the service of this order on Hill, and if the case presented by the Furnace Company's bill came within the scope and purview of this statute, there can be no question but that by the service of this order the court acquired jurisdiction over Hill to the extent provided by the statute, viz: of his interest in or lien on the property covered by the trust deed and chattel mortgage, which was in part the subject of this suit.

It is, however, alleged in the bill and argued by appellants, that the court could not acquire jurisdiction over Hill by this service, and that this order for service and all of its orders as affecting the interest of Hill in said

property were null and void. The argument submitted in support of this proposition, very briefly stated, is that this statute only authorizes the court to acquire jurisdiction over a non-resident defendant by service of an order to appear and defend in suits brought to enforce a specific prior existing lien or claim of the complainant on the property in question, and that the Furnace Company's bill was not a bill of this character, and did not seek to enforce a prior existing legal or equitable lien upon or claim to the property of the Iron Company.

This argument confounds this bill with an ordinary creditor's bill, and fails to take into consideration the nature and purpose of this bill. It was not a creditor's bill, as we have already said, but a bill for the administration and distribution of property that formed a trust fund. There can be no question, but that, upon the insolvency of a corporation, or its dissolution, its property becomes a trust fund, for its creditors, primarily, and after satisfaction of their claims, for its stockholders. Any creditor can maintain a bill for the administration of this trust, and the distribution of this fund. A bill of this character is a bill to enforce the primary lien and claim of the creditors upon this trust fund, and conforms to the first class of suits described in the statute. Under such a bill, a non-resident defendant, claiming an interest in the property of the corporation that forms the trust estate, can be brought under the jurisdiction of the court, to the extent of his interest in this property, by service upon him of an order to appear and defend to the bill.

But this argument refers solely to the first provision of this statute, and ignores entirely the second class of suits, in which the statute authorizes service of an order to appear to be made upon a non-resident defendant, and vests

by such service jurisdiction in the court, over the interest of the non-resident in the property within the district, which is the subject-matter of the suit, viz: any suit "*to* "*remove any encumbrance, or lien or cloud upon the title to* "*real or personal property within the district where such* "*suit is brought.*"

Prior to the adoption of th is act, the provision in the statute for substituted service was limited to suits "to en- "force any legal or equi table lien or claim against real or "personal property within the district where the suit is "brought." (U.S. Rev. Statutes, § 738.) And it has been held that, "this section was only intended to reach those suits "in equity, in which it was sought to enforce some pre-ex- "isting lien or claim, legal or equitable, upon or to some "specific property, real or personal, and not cases in which "it is sought to reach and appropriate the general prop- "erty of a defendant to the payment of his debts. By the "words 'legal or equitable lien or claim against real or "personal property,' Congress intended to reach every case "in which there should be any sort of charge upon a spe- "cific piece of property capable of being enforced by a "court of equity."

Shainwald v. *Lewis*, 5 Federal Rep., 510.

The same construction of Section 738 is adopted in
Insurance Co. v. *Bangs*, 103 U. S., 439.
Goodman v. *Niblock*, 102 U. S., 563.

Uuder these authorities, if the bill were viewed as an ordinary creditor's bill and not as a bill to enforce the equitable lien of creditors upon the trust fund, the argument which has been submitted by appellants would be entirely sound, if Congress had not by the act of March 3, 1875, which was as the court says in *Shainwald* v. *Lewis supra*, "evidently

"intended as a substitute for section 738," included the second class of suits—those to remove any encumbrance or lien upon, or cloud upon the title to real or personal property within the district.

To this second class of suits the Furnace Company's bill belonged so far as it affected the lien or encumbrance of the trust deed and chattel mortgage on the property covered thereby, and the claim of Hill to be entitled to share in this lien or incumbrance. The trust deed and chattel mortgage covered specific property, all of which was within the district, (as is shown by the averments of appellants' bill); and the Furnace Company's bill sought to remove the lien or incumbrance of these trust conveyances, attacking them as fraudulent, and praying that they might be held and adjudged fraudulent and void as against the creditors of the Iron Company. It was, therefore, a suit directly within the scope of this statute, and the court was authorized to cause service of its order to be made on Hill, and by this service acquired jurisdiction over him to the extent of his claim to a lien on this property under these trust conveyances.

The provisions of this act embrace any suit brought to remove liens or incumbrances upon real or personal property within the district. The act does not further define the character of the suits to which its provisions shall apply, nor does it in any way limit its application to any particular class of suits brought for this purpose, or to suits brought in any particular right. A suit brought by a creditor of an insolvent corporation for its dissolution and the closing of its business and the distribution of its assets among all creditors, in which it is specifically sought to remove the liens or encumbrances from property of the insolvent corporation created by trust conveyances, which

are specifically alleged to be fraudulent and void as against the creditors, is a suit to remove a lien or encumbrance within the scope of this act. It presents a case, which would authorize the court under this statute to direct service of an order on a non-resident lienholder, and the court would by this service acquire jurisdiction over the non-resident to the extent of his claim of lien on the property under the conveyances, that the bill attacks as fraudulent and seeks to have set aside and removed.

We have not been able to find any decisions that construe this provision of the act of March 3, 1875, or that touch upon the change which it makes in respect to the suits in which the court can acquire this limited jurisdiction over non-resident defendants. But as the Furnace Company's bill comes directly within the terms of this provision of the act, the proposition that the court acquired jurisdiction over Hill by the service on him of its order, to the extent of his claim of interest or lien under the trust deed and chattel mortgage, cannot require any support other than that given by the act itself.

2. *The service of the order on Hill to appear and defend to the cross-bill gave the court such jurisdiction over him in the cause, that its final decree, rendered in both the original and cross-causes, is conclusive on him and the appellants, until reversed on appeal, or set aside in some proper proceeding.*

While the original bill attacked the trust deed and chattel mortgage, and sought to have them adjudged fraudulent and void, the cross-bill was, in substance, a bill to enforce their liens, but attacking the lien given by them to Hill. The cross-bill was, therefore, a bill to enforce a prior existing lien, and, according to appellant's brief, the court had power under the provisions of the act of March 3,

1875, or of section 738 of the Revised Statutes, to acquire jurisdiction over Hill by the service of its order on him to appear and defend. This order was served on Hill on December 1, 1883, and not having appeared as directed, and remaining in default, a decree *pro confesso* on the cross-bill was entered against him on the 23d of April, 1884. By the service of this order we claim that the court acquired such jurisdiction over Hill, that independently of its jurisdiction over him in the original cause, its orders entered after this order was served on him, and its final decree, granting the relief sought in the cross-cause, cannot be treated as nullities, and void as to him, but must be held conclusive on him and the appellants in this collateral proceeding.

We do not understand counsel for appellants to question but that the nature of this cross-suit authorized service on a non-resident defendant under section 738 of the revised statutes; but the argument is that the cross-bill was not germane to the original cause; and if the court did not acquire jurisdiction over Hill in the original cause, it could not acquire jurisdiction in the cross-cause. Or as counsel puts it (Argt., 27): "The jurisdiction of the "court could not be enlarged by the cross-bill, and Hill's "interest in the property could not be affected by any "order or decree made on that cross-bill."

In support of this line of argument counsel has cited the cases of *Cross* v. *De Valle*, 1 Wallace, 1; *Putnam* v. *New Albany*, 4 Biss., 365; *Weaver* v. *Alter*, 3 Woods, 152; *Shields* v. *Barrow*, 17 Howard, 130, and *Ayres* v. *Carver*, 17 Howard, 591.

This argument is erroneous in two respects; in the first place it has for its premises, general definitions and statements concerning the nature and characteristics of cross-

bills, which when properly qualified and limited are entirely correct, but which do not embrace or apply to all cross-bills, and are not applicable to the cross-bill in the present suit; and in the second place, its conclusion from these premises, that the decree on the cross-bill is null and void as to Hill is manifestly a *non sequitur* and erroneous.

Cross-bills serve two different purposes and belong to two distinct classes. They are either pure cross-bills seeking a discovery, and brought solely as a defense, or they are bills seeking an affirmative, equitable relief, and may then be considered not purely cross-bills, but in the nature of original bills seeking further aid from the court. They are of a mixed character, partaking partly of the character of original bills and partly of the character of bills not original.

Story's Eq. Pleading, § 398.

The definition of a cross-bill, given by Cooper (Equity Pleadings, p. 85), which is generally stated, is: "A cross-" bill *ex vi terminorum*, implies a bill brought by a de-" fendant in a suit against the plaintiff, respecting the mat-" ter in question in that bill; and it is a weapon of defense in " in such case. But sometimes it is brought against the co-" defendants in such depending suit, when they have oppo-" site claims which the court cannot determine upon in the " bill already filed, and the determination of such clash-" ing interests is still necessary to a complete decree upon " the subject-matter of the suit." And Story, adopting the first part of this definition, adds: "A bill of this " kind is usually brought, either (1) to obtain a neces-" sary discovery of facts in aid of the defense to the or-" iginal bill, or (2) to obtain full relief to all parties,

"touching the matters of the original bill." (Story, Eq. Pl., § 389).

There is, however, a material distinction between these two classes of cross-bills and between a cross-bill that seeks affirmative relief as to other matters than those brought in suit by the bill, yet probably connected with it, and a cross-bill filed simply as a means of defense; and there are rules applicable to the one case and not to the other.

Story's Eq. Pleading, § 398, (9th Ed.), note a.

The Brandon Mfg. Co. v. *Prime*, 14 Blatchf., 372.

Lowenstein v. *Glidewell* (U. S. Circ. court, District of Arkansas), 6 Reporter, 454.

Ragland v. *Broadnax*, 29 Gratt., 401.

Ladner v. *Ogden*, 31 Miss., 339.

Dewees v. *Dewees*, 55 Miss., 315.

Jones v. *Smith*, 14 Ill., 229.

"When the cross-bill seeks relief, it is indispensable that "it should be equitable relief, otherwise it will be demur-"rable; for to this extent it is not a pure cross-bill, but it "is in the nature of an original bill, seeking the further "aid of the court beyond the purposes of defense to the "original bill. * * *

Story's Eq. Pleading, § 629.

And although the general statement of the rule is that "the cross-bill is auxiliary to the proceeding in the orig-"inal suit, and a dependency upon it." (*Ayers* v. *Carver*, 17 Howard, 591), yet this rule is particularly applicable to pure cross-bills brought solely by way of defense, and is not strictly applicable to the other class of bross-bills. A dismissal of the original bill carries the

cross-bill with it when the latter seeks relief by way of defense; but it is otherwise, and relief may still be given on the cross-bill where affirmative relief is sought thereby as to collateral matters.

Lowenstein v. *Glidewell*, 6 Reporter, 454.
Ladner v. *Ogden*, 31 Miss., 332, 344.
Warrell v. *Wade*, 17 Iowa, 96.
Ragland v. *Broadnax*, 29 Gratt., 401.
Chicago Artesian Well Co. v. *Conn. M. L. Ins. Co.*, 57 Ill., 424.

It is true that a cross-bill is an auxiliary suit and must be germane to the subject-matter of the original bill, and that matters foreign to the subject-matter of the original bill cannot be litigated by way of cross-bill; but the proposition stated in appellant's argument (page 27) that a cross-bill cannot be used for settling any controversy between defendants is not absolutely correct, without adding this qualification that the controversy be not germane to the original cause. Nor does the case cited, *Weaver* v. *Alter*, 3 Woods, 152, support this broad statement.

Cooper's Equity Pleading, 85.
Story's Eq. Pl., § 392.

"New and distinct matters, not included in the original "bill or libel, should not be embraced in the cross-suit, as "they cannot be properly examined in such suit, for the rea- "son that they constitute the proper subject-matter of a "new original bill or libel. *Matters auxiliary to the cause of "action set forth in the original libel or bill* may be included "in the cross-suit and no others, as the cross-suit is in gen- "eral incidental and dependent upon the original suit."

The Dove, 91 U. S., p. 386.

" A cross-bill must grow out of the matters alleged in " the original bill, and is used to bring the whole dispute " before the court, so that there may be a complete de- " cree touching the subject-matter of the action."

Ex parte Railroad Co., 95 U. S., p. 225.
Gregory v. *Pike*, 29 Fed. Rep., 588.

In the Furnace Company case, the original bill directly attacks the validity of the trust deed and chattel mortgage and sought to have them adjudged fraudulent and void, thus making their validity a direct issue in the case. One of the grounds of its attack upon the validity of these instruments was the preference given by them to Hill. The cross-bill asserted the validity of these instruments and sought to enforce the lien given by them for the benefit of the beneficiaries named therein, but attacked Hill's right to share in the lien given by them, and sought to have them declared invalid as to him. The charge in the cross-bill that these instruments were invalid as to Hill, and the prayer that they might be enforced for the benefit of the other beneficiaries does not introduce any new controversy into the cause. It was necessary for the purposes of a final decree on the original bill, which sought the dissolution of the corporation and the distribution of its assets, that there should be a determination of all liens upon the property of the iron works, and an adjudication of all rights and equities in it; the property was in the possession of the court; it would have to be sold; and the cross-bill therefore properly sought to have the rights of the beneficiaries named in those instruments determined, and their lien enforced, and the proceeds coming from the sale of the property covered by them applied by the court for the benefit of those who should be adjudged to be entitled to them. The questions as to whether these trust

conveyances were valid or not, and whether they should be set aside wholly or partially, or in whose favor they should be enforced, were all embraced within the subject-matter of the original bill; and this cross-bill was clearly germane to the original cause, and does not introduce new matters of controversies into it.

It is, however, argued by counsel that, under the original bill, the court acquired no jurisdiction over Hill, and that he was only brought into the cause by the service of the order on him in the cross-cause; that new parties cannot be brought into a cause by cross-bill; and the conclusion is drawn that the court could not acquire by this service any jurisdiction whatever over Hill, and its decree was void as to him. In support of this argument the case of *Shields* v. *Barrow*, 17 Howard, 130, is cited.

We have already discussed the question as to whether the court acquired jurisdiction over Hill by the service under the original bill, and need not refer to that branch of the argument further. But we take issue with counsel upon the two propositions involved in this argument: (1.) that new parties can never be brought into a cause by a cross-bill, and (2.) that the decree which the court renders upon the cross-bill is null and void as to one who is made a party to the cause by the cross-bill, and upon whom there has been service under the cross-bill.

Upon the first of these questions, it cannot be denied that in *Shields* v. *Barrow*, Mr. Justice Curtis, as a *dictum*, lays down the general rule that new parties cannot be brought into a case by cross-bill. In that case the court held that the Federal court could not take jurisdiction of the original cause, because certain persons who were not made parties, but were held to be necessary defendants to the original bill, were citizens of the same state as the

complainant. These parties the Circuit court had ordered to be brought into the cause by cross-bill, and it is in reference to this order and the cross-bill filed in compliance with it that Mr. Justice Curtis makes this statement, that new parties cannot be introduced into a cause by a cross-bill.

As a general proposition it cannot be applied to all classes of cross-bills; and exceptions must be recognized in the case of cross-bills that seek an affirmative equitable relief, touching the subject-matter of the cause, which requires the presence of new parties. In such cases, the course which is indicated in *Shields* v. *Barrow*, cannot be followed, because these parties are not necessary parties to the original bill, but become necessary parties to the cause on the filing of the cross-bill.

Brandon Mfg. Co. v. *Prime*, 14 Blatchf., 572.
McComb v. *The Chicaago, St. Louis & New Orleans R. R. Co.*, 19 Blatchf., 69.
Jones v. *Smith*, 14 Ill., 229, 232.
Hurd v. *Case*, 32 Ill., 45, 49, 50.
Blodgett v. *Hobart*, 18 Vt., 414.
Curd v. *Lewis*, 1 Dana, 351.
Wickliffe v. *Clay*, *id.*, 585.
Sharp v. *Pike*, 5 B. Monroe, 155.
Walker v. *Brumgard*, 13 Sm. & M., 723.
Costers v. *Bank of Georgia*, 24 Ala., 37.

In *Brandon Mfg. Co.* v. *Prime*, *supra*, a demurrer was interposed to a cross-bill upon this very ground, and the *dictum* in *Shields* v. *Barrow* was relied upon to support it. The court says (p. 373):

"Opposed to all this there is the remark of Mr. Jus-

" tice Curtis in *Shields* v. *Barrow*, and the reason given by " him in support of it to the effect that new parties cannot " in any case properly be added by cross-bill, without citing " any authority for it, and books and cases that have fol- " lowed that remark without citing any other authority. " * * * An examination of his reasoning shows that " he made the suggestion without much examination " probably, and his reasoning does not cover the whole " ground as to all classes of cases. The modes of pro- " cedure he suggests would probably be ample in all cases " of cross-bills brought for discovery in aid of a defense " merely to the original bill, but not in cases of those " brought for relief as well as defense, where new par- " ties would be necessary to the relief sought. * * * " Weighty as that remark is, it is not thought to be suffi- " cient to control the reasons and authorities to the con- " trary of it. The result of what is thought to be the " soundest reasoning and the best considered authorities " is that where a cross-bill shows that where there is a " party to the subjects of the litigation as presented by it, " who has not before been made a party, nor appeared to " be a necessary one, and then does appear to be such, " that party should be brought in by the cross-bill."

In *Jones* v. *Smith*, 14 Ills., 232, the court says: " But " it was objected that the cross-bill makes the judgment " creditors defendants, who were not parties to the origi- " nal suit. This is true, and necessarily so. * * * The " judgment creditors are not strangers to the subject-mat- " ter of the original suit; but no questions were presented " by the original bill growing out of that subject-matter " with which they were connected affecting their interests, " and hence it was not necessary then to make them par- " ties. * * * It is not introducing new and independ-

"ent matter into the cross-bill, and new parties, for the "purpose of answering that new matter, but it is present- "ing new facts connected with the subject-matter of the "original bill and answering it, and new parties whose in- "terest may be likewise affected by the new allegations."

It cannot, therefore, be stated as an absolute proposition, applicable to all cases, that new parties can never be brought into a case by a cross-bill. And if Hill were to be regarded as a new party brought into this cause by the cross-bill, we do not think, considering the scope of the cross-bill and relief sought by it, that it would be held on appeal or review that there was any error in the action of the court in taking jurisdiction of the cross-bill and directing service to be made on Hill to appear and defend in the cross cause. Hill's presence in the original cause was not indispensible for the jurisdiction of the court; the cross-bill was germane to the original bill, and did not introduce into the cause new and distinct controversies or matters; and Hill was a necessary party to the cross-bill, and for the purposes of the affirmative relief which it sought.

In the case at bar, however, the question is not one of error, but of jurisdiction; it is not a question as to whether this cross-bill presented a proper case for bringing Hill into the cause as a new party, but as to whether a new party can ever be brought into a cause by a cross-bill.

On this branch of the argument it is not necessary to say that we have assumed for its purposes that the court acquired no jurisdiction over Hill by service of its order in the original bill, and that the validity of its decree depends entirely upon its jurisdiction over him under the cross-bill; and we maintain that independently of the jurisdiction

under the original bill, Hill became a party to the cause, and was brought within the court's jurisdiction by the cross-bill and the service on him under it.

The second proposition involved in counsel's argument is, that the decree which the court renders upon a cross-bill which brings a new party into the cause, is a nullity as to that party, notwithstanding he has been duly served under the cross-bill.

It cannot be questioned that the court acquired by service of its order on Hill a jurisdiction over him under the cross-bill. Can, then, its decree rendered in the cross-cause as well as the original cause, be treated in this collateral proceeding as a mere nullity?

The substance of counsel's objections is that the cross-bill was too much of an original bill to be considered a proper cross-bill. Even if this objection is well taken, it cannot be asserted here; it could only be raised on appeal or by some proceeding in review. In other words, the objection that the cross-bill amounted to an original bill does not go to the jurisdiction and power of the court to render a decree on the cross-bill. The court, in treating it as a cross-bill, may depart from rules of practice or procedure, but it still has jurisdiction over the subject of the cross-bill and over the parties brought before it by the cross-bill.

Every cross-bill that is not a pure cross-bill brought by way of defense, that seeks an affirmative, equitable relief, is to that extent in the nature of an original bill, and partakes largely of the attributes of an original bill. Just where the cross-bill proper leaves off and the original bill in its composition begins, may not be in every case an easy matter to determine; and the court may err in enter-

taining as a cross-bill one that is too pronounced in the way of an original bill. But this error surely does not deprive it of jurisdiction over the parties brought before it by the cross-bill, if it has jurisdiction over its subject-matter.

In the Federal courts, where the jurisdiction is dependent upon the citizenship of the parties, the question, which we suggest, might arise in the case of a bill that was not germane and ancillary to the subject-matter of the original cause, but was in fact an original bill bringing matters into litigation wholly outside of the original cause, and in which the citizenship of the parties to the nominal cross-bill did not confer jurisdiction on the Federal court. This would be the case really before the court in *Weaver* v. *Alter*, 3 Woods, 152.

This question cannot arise here, because as we have already shown this cross-bill was germane to the matter of the original cause and ancillary to it and did not bring in outside matters or controversies. Hence the jurisdiction which the court had over the subject-matter of the original bill conferred jurisdiction on it of the cross-bill, and the citizenship of the parties to the cross-bill was wholly immaterial.

Railroad Companies v. *Chamberlin*, 6 Wall., 748.
First Nat. Bank v. *Salem Capital Flouring Mills Co.*, 31 Fed. Rep., 580.
Gregory v. *Pike*, 29 Fed. Rep., 588.

If then, Hill was brought into the cause as a new party by the cross-bill, the question is whether or not the court got any jurisdiction over Hill by the service of its order upon him under the cross-bill. To this question there

can be but one answer. It got jurisdiction over him to the full extent of its jurisdiction over the subject-matter of the cross-bill, and its decree against him granting the relief sought by the cross-bill is conclusive on him in every collateral proceding, and is a bar to the prosecution of this suit. If there was any departure from the practice and procedure of courts of equity in bringing him into the case in this manner, it can only be questioned on appeal or review, but not here.

In conclusion, we respectfully submit that the court acquired jurisdiction over Hill under both the original and the cross-bills, and that its decree in the cause, that the trust deed and mortgage were invalid as to Hill and that he was not entitled to the benefit of them, is a conclusive bar to the prosecution of this suit; and the judgment of the Circuit court sustaining the plea and dismissing the bill should be affirmed.

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